LAWYERS AND LITIGANTS IN ANCIENT ATHENS

ROBERT J. BONNER

R. E. Kleinbeck.

LAWYERS AND LITIGANTS IN ANCIENT ATHENS

THE UNIVERSITY OF CHICAGO PRESS
CHICAGO, ILLINOIS

THE BAKER & TAYLOR COMPANY
NEW YORK

THE MACMILLAN COMPANY OF CANADA, LIMITED
TORONTO

THE CAMBRIDGE UNIVERSITY PRESS
LONDON

THE MARUZEN-KABUSHIKI-KAISHA
TOKYO, OSAKA, KYOTO, FUKUOKA, SENDAI

THE COMMERCIAL PRESS, LIMITED
SHANGHAI

LAWYERS AND LITIGANTS IN ANCIENT ATHENS

The Genesis of the Legal Profession

By ROBERT J. BONNER, PH.D.
PROFESSOR OF GREEK, THE UNIVERSITY OF CHICAGO
FORMERLY OF THE ONTARIO BAR

"*A civilized system of law cannot be maintained without a learned profession of the law.*"—SIR FREDERICK POLLOCK

THE UNIVERSITY OF CHICAGO PRESS
CHICAGO · ILLINOIS

Published May 1927

Composed and Printed By
The University of Chicago Press
Chicago, Illinois, U.S.A.

INTRODUCTION

Nowhere has popular sovereignty been so completely realized in practice as in ancient Athens. The sovereign people exercised their power not merely at intervals; they actually wielded it at all times. The national assembly, composed of all citizens, debated and decided all questions of public policy. The legislative, executive, and judicial functions of government were exercised by commissions drawn from the citizen body by lot. Thus the people actually administered justice, interpreting and applying the law in each case as they saw fit. No trained jurist on the bench balked the popular will by citing inconvenient precedents. In theory, a judicial decision rendered today could be reversed in a similar case tomorrow.

Ever jealous of the expert, as democracy always is, the Athenians even tried to prevent the rise and development of a legal profession. The law required every man to plead his own case in court and permitted any man to prosecute a public offender. There were no official public prosecutors. The law did not forbid one citizen to aid another by making a plea in his behalf in court, but it did forbid the acceptance of fees for such service. No attempt, however, was made to prevent a litigant from reciting as his own a speech composed for him by an expert. Such a prohibition would have been quite futile. The attempt to prevent professionalism in the administration of justice was not altogether successful. At any

rate, the considerable number of citizens—professional prosecutors (sycophants), speech-writers, and advocates—who devoted themselves almost exclusively to prosecuting wrongdoers and aiding those who were involved in litigation rendered services to the community similar to those performed by members of the modern bar, and are entitled to be regarded as professional lawyers. These earliest representatives of an ancient and important profession have not received either from lawyers or historians the attention they deserve. Only a few studies have been devoted specifically to the Athenian legal profession. The following are the most important. Forsythe's *Hortensius, or the Advocate* (1849) is "an historical sketch of the office and functions of an advocate in Greece, Rome, France and England." In so comprehensive a work comparatively little space is given to the profession in Athens. Egger's *Si les Athéniens ont connu la profession d'avocat* is a suggestive paper of thirty pages read before L'Académie des belles-lettres in 1860. Calhoun's *Athenian Clubs in Politics and Litigation* (1913) is a comprehensive study of the political and litigious activities of these hitherto little-understood associations. *Sycophancy in Athens* (1917) by Lofberg is a detailed study of the rôle of the professional accuser. Drerup's *Aus einer alten Advocatenrepublik* (1916) deals almost exclusively with the political activities of the legal profession in Athens.

In the following pages I have tried to present a more detailed account of Athenian lawyers than was possible in such a comprehensive treatise as Forsythe's and more general than the special studies of Lofberg and Calhoun.

In the chapter on "The Attic Orators" I have emphasized the professional rather than the literary aspect of their work. The influence of some of them on Attic prose style was very great, but such matters have been adequately and abundantly treated in books that are easily accessible.[1] For my purpose it seemed better to confine my attention to their qualities as lawyers and the political activities and influence of those who took an interest in public affairs.

The professional activities of Athenian lawyers cannot be properly appreciated and understood without some knowledge of the organization of the courts and legal practice and procedure. These somewhat technical matters are disposed of in two brief chapters at the outset. English legal terminology has been used as far as possible to translate the technical terms of Attic law. These equivalents are not always accurate, but the advantage of using terms with which the reader is more or less familiar is so great that one may well risk the loss of accuracy that might be gained by using a foreign word according to the practice of continental European scholars. Occasionally the transliterated Greek word is preferable. For example, it is easier to call the members of an Athenian court "dicasts" and explain their functions than to use the word "jurors" with an explanation of the difference. In the interest of brevity and simplicity one is often tempted to resort to unqualified statements where strict accuracy would require reservations, quali-

[1] Dobson, *The Greek Orators;* Jebb, *Attic Orators from Antiphon to Isaeus;* Blass, *Attische Beredsamkeit;* Navarre, *Essai sur la Rhétorique Grecque avant Aristote.*

fications, or explanations. I can only hope that I have not yielded too much to this temptation.

The materials for the chapters on "The Judiciary" and "Practice and Procedure" have been drawn mainly from such standard works as the section on "Law" by Wyse in Whibley, *Companion to Greek Studies;* Gilbert, *Griechische Staatsalterthuemer* (quoted from the translation of Brooks and Nicklin); and Lipsius, *Das Attische Recht.* For the justification of views contrary to those found in these books I have referred to my own publications and to those of my former students who are working in this field: Dr. G. M. Calhoun, University of California; Dr. J. O. Lofberg, Washington and Lee University; Dr. H. G. Robertson, University of Toronto; and Dr. Gertrude Smith, University of Chicago.

Believing that the Athenians are the best interpreters of their own institutions, I have quoted freely from the orators and other contemporary writers.[2] Where opposing views were available I have given both in order that the reader may form his own opinion. Unfortunately, however, where democracy and its institutions are under discussion the indictments outnumber the apologies. This is natural. Men who were interested in the practical problems of democracy had as a rule neither the inclination nor the capacity to deal with armchair

[2] The following versions have been used: Aeschines (Adams, Loeb Classical Library); Aristophanes (translations are either based upon, or quoted from, Rogers); Aristotle, *Polity of the Athenians* (Kenyon), *Politics* (Jowett), *Rhetoric* (anonymous); Demosthenes (Kennedy); Plato (Jowett); Plutarch, *Lives* (Clough, Everymans Library); Thucydides (Smith, Loeb Classical Library, and Jowett); Xenophon (Dakyns).

critics. It was not to be expected that there should be many cultured men like Pericles to champion the cause of democracy or great writers like Thucydides to report them.[3]

In the discussion of such topics as "The Character of Athenian Courts" and "Athenian Litigiousness" I have tried neither to magnify the virtues nor to minimize the faults of the Athenian judicial system. In setting forth in some detail the differences between the Athenian system and our own my purpose is not to apportion praise or blame, but rather to facilitate the understanding of an unfamiliar system. It is not easy to pass a fair judgment on an ancient institution. Standards of excellence in government are relative, not absolute. In estimating the achievements of Athens in working out a satisfactory judicial system comparisons should be made not only with modern accomplishments in the field but also with those of her neighbors and with her own earlier practice.

What lessons the experience of the most famous of ancient democracies in the administration of justice may have for the greatest of modern democracies I leave the reader to determine. Doubtless both the advocates and the opponents of trial by jury will find support for their respective views.

The book is intended primarily for the reader who desires to acquaint himself with an important and at-

[3] Thucydides ii. 35 ff. reports the oration of Pericles delivered at the obsequies of those who fell in the first year of the Peloponnesian War (431–404 B.C.). This speech is an encomium on Athenian democracy.

tractive phase of Athenian public life and for the lawyer who is interested in the history of his profession. But the needs of the students of Athenian forensic oratory have not been neglected. In fact, for a number of years the material in the chapters on "The Judiciary," "Practice and Procedure," and "Forensic Oratory" has been used in my classes reading the Attic orators.

For many helpful suggestions during the progress of the work I wish to thank Professor G. M. Calhoun, of the University of California; Professor J. O. Lofberg, of Washington and Lee University; and my colleague, Assistant Professor Gertrude Smith.

Robert J. Bonner

University of Chicago
December, 1926

TABLE OF CONTENTS

CHAPTER I

THE ATTIC ORATORS

The Athenians claimed the credit of being the first to establish regular processes of law, a claim which Cicero seems inclined to admit. The administration of justice in Athens was mainly conducted by amateurs. In the fifth and fourth centuries magistrates selected by lot held preliminary hearings and presided over the trials before popular courts. The requirement that each litigant should conduct his own case with such assistance as relatives and friends could render was not so unreasonable in a community where all citizens participated in the deliberations of the sovereign assembly and were free to address their fellow-citizens on all public questions. In such conditions the proportion of citizens who could speak in public was much larger than in a modern community. But when about the middle of the fifth century the theory of rhetoric was developed and systematically taught, those who had the inclination and the means to acquire the "art of persuasion," as the Greeks called oratory, had an immense advantage over their untrained opponents in the law courts. As a consequence, expert rhetoricians began to compose speeches for clients to be recited in court as their own. Many orations of these speech-writers were published. An effective speech was a good professional advertisement for an ambitious speech-writer. About sixty orators are known to

us by name, but practically all the extant orations have been transmitted as the work of ten men, the so-called "Canon of the Ten Orators," or the "Decade of the Orators." Contemporary interest in these speeches was due to their practical value as models for litigants, lawyers, and students of rhetoric. But later scholars and critics became interested in them because of the material they furnished for the study of the development of Attic prose style. And so they selected ten typical orators for study. The earliest record of the list is the *Lives of the Ten Orators,* wrongly attributed to Plutarch, the great biographer of antiquity, and included in his miscellaneous works. The *Lives of the Ten Orators* are now cited as the work of Pseudo-Plutarch. They were composed in the first century A.D., but it seems probable that the list was drawn up in the second century B.C. by a scholar at Pergamum,[1] a center of learning that rivaled the famous Museum of Alexandria.

The immediate effect of this selection was to fix attention almost exclusively on these orators and insure the preservation and transmission of their works. Ancient critics like Dionysius of Halicarnassus in the first century B.C. were familiar with many more orations than we now possess, but many of them were even then regarded as spurious. In the Demosthenic *corpus* there are a number of speeches that admittedly do not belong to Demosthenes, but they are contemporary productions and valuable documents even if they do not reach the standard of literary excellence set by Demosthenes. The vicissitudes of the speeches of Hyperides, one of the ora-

[1] Brzoska, *De Canone Oratorum Atticorum.*

tors of the Canon, are unusually interesting. Up to the middle of the nineteenth century only a few fragments were known. It was generally supposed that a manuscript edition of his works existed in Budapest when the library was destroyed by the Turks in 1526. During the last half of the nineteenth century six orations in more or less complete condition have appeared among Egyptian papyri. One of these papyri belonging to the second century B.C. is among the earliest extant manuscripts of a classical author.

Others besides literary critics studied the orators and explained technical matters and words and phrases not generally understood in the Graeco-Roman world. Harpocration in the first or second century A.D. published a lexicon of words and phrases in the Ten Orators. A section of the word lists of Pollux, arranged according to subject matter, is devoted to legal terminology. On the margins of many manuscripts of classical authors appear notes and comments drawn from sources no longer extant and accessible. These unknown scholars to whose industry we owe so much are collectively denominated the "scholiast." These ancient lexicographers, grammarians, scholiasts, and handbook-makers drew considerable material from Aristotle's *Constitution of Athens,* which contains an exceedingly valuable treatment of the history and organization of the Athenian judiciary, known only in the form of quotations until the complete work was recovered from Egypt and published in 1891.

The ancient rhetoricians divided oratory into three main divisions: epideictic, deliberative, and forensic.

Deliberative oratory was addressed to the people in the general assembly. Forensic oratory was delivered in the law courts. These two types are sometimes classified as "political oratory" because they are both concerned with the business of government. The Romans used the term "civil oratory" to denote this type. Epideictic or display oratory included all other kinds of orations. Chief among them were those delivered on the occasion of festivals or public rites such as the Olympic games and state funerals for those who had fallen in battle. All kinds of moral discourses were included. Over seventeen hundred speeches attributed to the ten orators were known in antiquity, but only one hundred and thirty are extant. Of these, one hundred and five belong to the forensic class.

The Attic orators fall naturally into two groups: first, the predecessors of Demosthenes (425–350), Antiphon, Andocides, Lysias, Isaeus, and Isocrates; second, Demosthenes and his contemporaries (350–300), Aeschines, Lycurgus, Hyperides, and Dinarchus. Isocrates, who lived to be ninety-seven years of age, belongs to both periods.

Antiphon[2] (480–411 B.C.) was the chief leader of the oligarchs who overthrew democracy in 411 B.C. Thucydides says:

> The man who devised the method by which the whole matter was brought to this issue and who had for the longest time devoted himself to the problem was Antiphon, a man inferior to none of the Athenians of his own day in force of character and one who had proved himself most able both to form a plan and to set forth his conclusions in speech; and although he did not come before the

[2] For an account of the trial of Antiphon see p. 244. In the case of most of the orators only approximate dates can be given.

assembly or willingly take part in any public contest, but was under suspicion with the people on account of his reputation for cleverness, yet he was the one man most able to help any who were involved in contests either in the court or before the assembly, in case they sought his advice.

Thucydides mentions the brilliancy of his defense when he was tried for treason on the overthrow of the Four Hundred.

Antiphon was reputed to be the "inventor and founder of the political style of oratory." The statement of Thucydides shows that he was active in both the deliberative and the forensic branches of political oratory. Moreover, he not only wrote speeches for his clients but also gave them advice. In relating the further progress of the plot against democracy Thucydides says: "The people and the senate were still none the less convened; but they discussed nothing that was not approved by the conspirators; nay, not only were the speakers from this party but what should be said had been previously considered by them." There is no doubt that Antiphon played an important part in outlining and composing speeches for the oligarchic orators. At least one ancient critic attributes deliberative speeches to him. And there is no occasion on which he could have had greater opportunities for aiding men "involved in contests before the assembly."

All of Antiphon's published orations were forensic. It is a matter of accident that his extant orations, consisting of twelve practice speeches, grouped in three tetralogies with two speeches on either side, and three speeches composed for clients, all deal with homicide.

Of his other nineteen orations of which we have titles and fragments none deals with homicide. They deal with a variety of cases, but there is some indication that among his clients were men of oligarchic sympathies who were engaged in a more or less systematic attack on democratic politicians in the courts with a view to discrediting democracy. This would furnish some explanation of Thucydides' statement that Antiphon had for a long time devoted himself to the problem of the revolution. It was not unusual for political plotters to pave the way for their schemes by means of prosecutions in the courts. Ephialtes' attack on the Areopagus in 462, which resulted in depriving that ancient conservative council of its political powers and most of its judicial functions, was preceded by attacks on individual Areopagites. The revolutionists of 411 B.C. apparently followed the same practice, and Antiphon furnished the speeches for the prosecutors. One of Antiphon's extant speeches is a defense of a *choregus*[3] charged with homicide. A member of a boys' chorus being trained at his expense for a public festival died as the result of taking some medicine for sore throat. Relatives of the boy were induced to bring the charge, it was claimed, to disqualify the *choregus* for prosecuting some officials whom he had charged with misappropriating public funds. On the first occasion the charge of homicide was not pushed and the *choregus* secured the conviction of the defendants. The

[3] It was the duty of the *choregus* to "collect, maintain, instruct, and equip one of the many choruses needed for the dramatic and musical and orchestric competitions at the great festivals" (Whibley, *Companion to Greek Studies,* p. 408). Cf. p. 101.

same tactics were resorted to on a later occasion when the *choregus* was engaged in a similar prosecution of dishonest officials. This time the homicide case was brought to trial. Antiphon composed the speech in defense of the *choregus*. Among the lost orations is one against Philinus which in all probability is the speech delivered by the *choregus* in his prosecution of Philinus on the charge of appropriating public funds. Other fragments indicate that Antiphon also participated in the prosecution of Athenian overseas officials by composing speeches for the prosecutors. In at least two cases Antiphon acted as counsel for communities that sought redress in the matter of the tribute levied on them. His championship of the subject states of the empire extended to the defense of individuals charged with crimes which, though committed overseas, were tried in Athens. The Herodes murder trial is a good example of this phase of Antiphon's activities. Euxitheus, a native of Mytilene, was charged with the murder of Herodes, an Athenian resident in the island. The father of the defendant was a man of means, and belonged to the class which was usually opposed to Athenian rule. When a member of this class appeared before an Athenian tribunal he was not always sure of fair treatment, if allegations made in this case and some jests of Aristophanes may be trusted. The political aspect of the trial is found in the fact that Euxitheus, knowing of Antiphon's political views and sympathies with the subject states, sought his assistance. These activities of Antiphon taken together have the appearance of more or less deliberate hostility to the democratic administration at home and

abroad and active sympathy with the grievances of the subject states.

Antiphon's reputation for rhetorical skill and subtlety aroused so much popular prejudice against him that his open advocacy of a cause would have been more harmful than helpful. Consequently, as Thucydides points out, he refrained from speaking in public. This is surprising in view of the fact that no less able orators such as Demosthenes and Hyperides were not looked upon with suspicion because of their superior oratorical abilities. The explanation is in part due to the novelty of the art of rhetoric in Antiphon's time and in part to the current belief that Antiphon employed it to defeat the ends of justice to his own profit. He was ridiculed on the comic stage for being avaricious and for making profit out of the predicament of trembling defendants. People were distrustful of an art which according to popular belief could "make the worse appear the better reason." His practice speeches—the *Tetralogies*—in particular, as Jebb remarks, exhibit "great facility in fighting a cause that could hardly be defended on any broad ground by raising in succession a number of more or less fine points."

Andocides (440–380? B.C.) was an aristocrat whose family had for three generations been active in public life. In 415 B.C., while Andocides was still in his twenties, the famous mutilation of the tutelary statues of Hermes that were to be found everywhere throughout the city occurred. Great excitement ensued which was intensified when it transpired that the Eleusinian mysteries sacred to the divinities Demeter and Persephone

and much revered in Athens had been travestied in private houses. The gross impiety of these acts was all the more serious in the eyes of the Athenians because the great expedition to Syracuse was on the eve of sailing. Andocides and some of his relatives were suspected of complicity in the Hermes affair and imprisoned. Under promise of immunity he confessed to a guilty knowledge of, if not actual participation in, the sacrilege, and implicated a few others. He was released, but a decree of Isotimides banishing from market and temples those who on their own confession were guilty of impiety was held to involve him. Rather than submit to such a curtailment of his liberty he left the city. After a successful career as merchant and adventurer in many lands he did Athens a service in 411 B.C. by furnishing her with much-needed oar-spars which he was able to secure by reason of his connections with the king of Macedonia. Returning to the city expecting to be hailed as a public benefactor and relieved from his disabilities, he was thrown into prison by the Four Hundred who had in the meantime succeeded in subverting the democracy. On the overthrow of the oligarchs he was released and again went abroad. Owing to his interests in Cyprus, he was able to obtain a permit for the export of grain to Athens during a period of scarcity. Relying upon this service, he appealed to the courts in 410 B.C. for release from his disabilities, but without success. Under the general amnesty which followed the overthrow of the Thirty Tyrants in 403 he returned to the city and participated actively in public affairs. But in 399 his enemies revived the case against him by charging him with impiety for

participating in the Eleusinian mysteries from which they claimed he was excluded by the decree of Isotimides. Instead of entering a demurrer that he was protected by the amnesty, he rebutted the charge and at the same time urged the court to abide by the terms of the amnesty which had been so salutary in its effects. Indeed, three of his five accusers, Cephisius, Meletus, and Epicares, would themselves be liable to prosecution if the amnesty were suspended or disregarded. Andocides was supported by Anytus and Cephalus, prominent politicians, as well as by advocates chosen by his tribe. It is interesting to observe that two of the men engaged in this case—Meletus and Anytus—were in all probability the accusers of Socrates. This time Andocides was acquitted. In 390 he was a member of a peace embassy sent to Sparta, and a speech of his is extant supporting in the assembly the terms offered by Sparta on that occasion.

Andocides was neither a rhetorician nor a professional speech-writer. He had the regular education of an Athenian of the better class. Rhetoric was included, but he made no special study of the subject. He was well acquainted with the Hellenic world from Syracuse to the Hellespont and from Macedonia to Cyprus. He had dealings with kings and tyrants including Archelaus of Macedonia from whom he secured a timber concession, Evagoras of Cyprus from whom he obtained a permit to export grain to Athens, Dionysius of Syracuse and the king of the Citians. He was possessed of a wide experience in human nature, was shrewd and successful in business, quickwitted and resourceful in difficulties. He

had besides a natural aptitude for oratory. It was no hardship to require a man like Andocides to plead his own case in court. Andocides was not a stylist like the other orators in the Canon. He was an amateur among experts. His inclusion in the list was perhaps due in part to the interest aroused by his natural eloquence and in part to the important events which he narrated.

Lysias (450–380 B.C.) was the son of a Syracusan. Consequently, though born in Athens, he was not an Athenian citizen. The family was on intimate terms with both Pericles and Plato. The scene of Plato's *Republic* is laid in the house of Polemarchus, the brother of Lysias. The two brothers migrated to Thurii, a Greek colony in Italy. After the Athenian defeat at Syracuse in 413 there was a reaction throughout Magna Graecia, as Hellenic Italy and Sicily were called, against all Athenian sympathizers. Lysias and his brother returned to Athens in 412 and engaged in the manufacture of shields. It proved to be a lucrative business, and their wealth attracted the cupidity of the Thirty Tyrants. Lysias managed to escape after being arrested, but his brother was put to death. On the restoration of democracy a bill was passed granting to him and other aliens citizenship as a reward for their services in the counter revolution. But, owing to a technical flaw, the bill was declared illegal and Lysias remained an alien.

Stripped of his fortune by the Thirty Tyrants, he turned to speech-writing as a profession. It seems that in his earlier years he had indulged a taste for rhetoric in an amateurish and dilettante way. It is said that during his sojourn in Thurii he studied with Tisias, the fa-

mous pupil of Corax, the originator of formal rhetoric. Over four hundred speeches were credited to him in antiquity; thirty forensic speeches have been preserved. They deal with a wide variety of cases. Only one was delivered by himself. On the overthrow of the Thirty Tyrants he prosecuted Eratosthenes, a member of the moderate section of the tyrants, who elected to stand his audit under the terms of the amnesty which granted that privilege to the Thirty Tyrants and some of their subordinates. Lysias made a special point of the judicial murder of his brother. It is not unlikely that his experience in this case encouraged him to embark on speech-writing as a career. Although Lysias being an alien could not personally intervene in politics, he nevertheless like Antiphon played a part behind the scenes. Dionysius of Halicarnassus quotes from what purports to be a deliberative speech written by Lysias for a client who participated in a debate on a proposed law to restrict the franchise to landholders. The proposal would have disfranchised some five thousand citizens. A more plausible theory[4] regarding this fragment is that it was a political pamphlet published in the form of a speech before the assembly. Lysias cleverly puts this defense of radical democracy in the mouth of a landholder who, being unaffected by the proposal, had no personal interest in the bill. The sentiments expressed in the pamphlet are quite consonant with the tenor of the speech against Eratosthenes. Speeches composed for other clients exhibit similar radical democratic tendencies.

Little or nothing is known about the life of Isaeus

[4] Drerup, *Aus einer alten Advocatenrepublik*, p. 22.

(420–353? B.C.). His professional activities extended over the years 390–353. On this basis the approximate dates of his life may be given as 420–353. It is said that Demosthenes repaired to him for aid in his litigation against his guardians. It is even suggested that Isaeus composed the speeches for the first suit. But whatever relations may have existed between the two, personally or professionally, the stylistic influence of Isaeus on Demosthenes is manifest. Of the sixty-four speeches credited to Isaeus in antiquity eleven survive. All deal directly or indirectly with inheritance cases. Consequently, he is particularly valuable as a source of information regarding the highly intricate Athenian laws governing the devolution of estates. His distinguishing characteristics as a lawyer are his legal erudition and his skill in argument. An ancient critic[5] observes that he browbeats his opponents and outwits the judges. In this verdict a recent editor[6] of Isaeus concurs most heartily.

The silence which surrounds the life of Isaeus is to be explained, as Jebb observes, by the fact that he had no connection, either literary or political, with the affairs of Athens. This silence is also an instructive commentary on the career of a successful Athenian lawyer. No modern lawyer as eminent and successful in his profession as Isaeus was could escape publicity. The Athenian lawyer did his work in silence and obscurity; success brought no personal publicity. His personality, his voice, and his character had nothing to do with his professional

[5] Dionysius of Halicarnassus (first century B.C.).

[6] Wyse, *Speeches of Isaeus*. Cambridge University Press.

efficiency. These qualities are indispensable for success at the modern bar.

Isocrates (436–338 B.C.) was born before the Peloponnesian War began and died in the year of the disastrous battle of Chaeronea, at the extraordinary age of ninety-seven in full possession of his faculties. His life embraced a period of stirring events and epoch-making changes. When he was born Athens was at the height of her imperial power. He lived to see Athens, Sparta and Thebes in turn win and lose the hegemony of Greece. When he died Philip of Macedon was master. For the last forty years of his life, in a series of brilliant essays couched in the form of public addresses and open letters, he had advocated national unity under competent leadership to save Hellas from the ever encroaching power of Persia. He lived to see his ideal in process of being realized under Macedonian leadership. He died before the high hopes he cherished proved impossible of realization. Greek liberty could not be reconciled with Macedonian autocracy.

A weak voice and a timid disposition debarred him from public life so that when he lost his property during the Peloponnesian War he took up teaching as a profession and established a school which numbered among its alumni many distinguished Athenians and foreigners. When Artemisia, widow of Mausolus, tyrant of Caria, instituted a contest of eloquence in honor of her husband all of the competitors were pupils of Isocrates. Only six forensic speeches composed in his youth have survived. In later life he would gladly have disowned them entirely. He became one of the most unsparing

critics of forensic oratory. This hostility is mainly due to his animosity toward unworthy rivals who made preposterous promises to prospective pupils. Isocrates is of no importance as a lawyer. In fact, it is doubtful if his forensic speeches would have survived had he not achieved eminence as a political essayist and stylist. Only once was he personally involved in litigation. He protested against undertaking the expensive burden of equipping a warship for service, claiming that another citizen whom he named was more capable of performing the service. The matter came before the court in the form of an *Antidosis* ("exchange"), so called because the plaintiff offered to exchange property with the citizen named and to perform the service. Owing to illness he received permission to have his stepson speak for him. The speech delivered on that occasion which Isocrates no doubt composed is not extant. The speech on the *Antidosis* which has survived is an *apologia* or defense of his theory of education cast in the form of a forensic speech against vague and imaginary charges made by a sycophant.[7] He insisted upon calling himself a philosopher, and has in consequence suffered by comparison with Plato in both ancient and modern times. Likewise, in politics he has been overshadowed by the great patriot Demosthenes. In recent years, however, there are signs of a reaction against Demosthenes and in favor of Isocrates.[8]

[7] Bonner, "The Legal Setting of Isocrates' *Antidosis*," *Classical Philology*, XV, 193 ff.

[8] Bury, *History of Greece*, pp. 704 ff.; Walker, "Greek History" and "The Constitution of Athens," *Encyclopaedia Britannica*.

The earlier orators were involved in politics only indirectly. Antiphon, it is true, was the master-mind of the Four Hundred in 411, but he had no connection whatsoever with the actual administration of government. Indeed, he never once addressed the assembly where the active politicians known as orators (*rhetors*) were always in evidence. Lysias also seems to have played an important part behind the scenes in the democratic restoration in 403 B.C., but being an alien he was debarred from speaking in the assembly. Isocrates exercised great influence by his political essays but refrained by choice from active participation in politics. Andocides became notorious by reason of his youthful escapade in connection with the mutilation of the Hermae, but otherwise his participation in politics was not different from what was to be expected from any active citizen of good family.

During this period Athens, Sparta, and Thebes successively won and lost the leadership of Greece in a series of exhausting wars that left the king of Persia arbiter of Greece, as appears in the so-called "King's Peace" (Peace of Antalcidas, 387–386 B.C.). One of the terms was: "If any refuse to accept this peace I [the king] shall make war on them, along with those who are of the same purpose both by land and sea." This was a Persian edict, not a peace treaty. In 376 Athens tried to resuscitate her empire over the islands of the Aegean, but without any real success. For a brief period the Phocians in Central Greece, resisting a sentence for sacrilege imposed

on them by the Amphictyonic[9] Assembly—a league of nations organized mainly for religious purposes—seized the treasures of Delphi and mastered Central Greece. Meanwhile, Philip of Macedon was consolidating his power in Macedonia and extending his influence in Thessaly and Thrace. His designs and conquests in Chalcidice and the Hellespont alarmed Athens because of the threat to her supplies of food and raw materials. But it was not until the Amphictyonic Assembly asked Philip to aid them against Phocis that he passed Thermopylae and became a menace to Greece. The Phocians were crushed, and Philip took their place on the Amphictyonic Council. The Peace of Philocrates (346) recognized Philip's commanding position in the international affairs of Greece. Athens acquiesced with bad grace and refused all of Philip's advances toward an understanding. In the end war resulted and the opponents of Macedon with Athens at their head were signally defeated at Chaeronea in 338. Alexander succeeded Philip as king of Macedonia and dictator of Greece and began his career of conquest in the east in 334. In 324 Harpalus, his absconding treasurer, came to Athens with a huge sum of money to seek asylum, but the Athenians, fearing the power of Alexander, arrested Harpalus and deposited the money in the Acropolis for safekeeping. Demosthe-

[9] The Amphictyonies were religious and political associations of a number of neighboring states. The most famous of these assembled at Delphi and Thermopylae. Its membership was limited to twelve states with two votes each. It sought to enforce a number of rules governing international relations. But it soon degenerated into a tool in the hands of the more powerful members.

nes was one of the commissioners in charge. It was soon discovered that only half of the money which Harpalus had when he arrived was deposited. The Areopagus conducted an investigation to discover what became of the missing funds. The report of the commission implicated a number of politicians, including Demosthenes, in the acceptance of bribes from Harpalus. On the death of Alexander (323) Athens was the leading spirit in the revolt against Antipater, governor of Macedonia. Athens was defeated and obliged to accept an oligarchic constitution and to surrender the orators responsible for the anti-Macedonian policy.

Throughout the struggle with Macedonia, Athenian policy was determined by Demosthenes and his contemporaries. Isocrates, who lived to see the triumph of Philip at Chaeronea, belongs to both periods. Recognizing the futility of the perpetual warring of the small sovereign states for supremacy, he urged the Greeks to unite under competent leadership in a great foreign enterprise which would at once rid them of the menace of Persia and provide the increasing surplus population with homes in conquered barbarian lands. To him Philip seemed the man of destiny, and he welcomed him eagerly. Demosthenes, on the other hand, believed that while the Greeks should unite and offer the most strenuous resistance to any outside power that threatened Greek liberty they should with respect to one another maintain a balance of power or rather a balance of weakness. "It is to the advantage of Athens," said Demosthenes, in one of his addresses, "that both the Spartans and the Thebans should be weak."

The father of Demosthenes (384–323 B.C.), a wealthy manufacturer of arms, left a considerable fortune which the guardians of his infant children mismanaged and plundered. On coming of age Demosthenes by a rigorous course of training in law, rhetoric, and elocution fitted himself for the task of recovering his patrimony from his dishonest guardians. Isaeus, an expert in cases of this kind, was his teacher and adviser. Recovering only a small part of his inheritance he made use of his training and experience in law and became a successful speech-writer. Demosthenes began his political career while Persia was still regarded as the chief danger of Hellas, but he was quick to realize the danger from Macedonia and to warn the Athenians accordingly. He soon became the leader of the anti-Macedonian party along with Lycurgus and Hyperides. The leader of the peace party was Eubulus. Aeschines, a frank opportunist, soon espoused the Macedonian cause and became Demosthenes' chief opponent.

Demosthenes had a large and varied practice. Among the more interesting of his speeches are those dealing with maritime loan and insurance which afford much valuable information regarding maritime law and the grain trade. Perhaps the most impressive of his orations are those connected with indictments for illegal legislation. They exhibit in every paragraph a thorough knowledge of current politics, a wealth of legal lore and ingenuity in argument that are comparable with the work of the best modern constitutional lawyers. His chief fault is that occasionally he allows his zeal as a politician to obscure that air of judicial impartiality

which all really great counsel affect in dealing with constitutional law. But it must be borne in mind that after all Demosthenes is addressing several hundred citizens as partisan as himself and not a supreme court of learned judges. If anyone doubts that the Athenian system could produce great lawyers let him peruse the speeches against Timocrates and Aristocrates.

The famous prosecution of Meidias for assault and battery committed upon the person of Demosthenes while the latter was acting as master of the chorus for the Dionysiac festival has a political aspect that has not been generally recognized. In spite of the scathing invective with which Demosthenes excoriates the wealthy Meidias in the end he compromised the case for a trifling sum. This is not really as discreditable as it seems. Meidias was associated with Eubulus, the leader of the opposing party, and just at that time party interests made it inadvisable for Demosthenes to push to a conclusion a serious charge against an influential political opponent.[10]

Apparently after he became involved in politics he refrained from appearing personally in the courts as an advocate. When his relative Demon asked for his assistance in a case he agreed to render what aid he could but said: "Since I began to speak on public affairs I have never interfered in any private case." This does not mean that his political activities interfered with his professional activities as speech-writer.

Demosthenes' connection with Harpalus has generally been regarded as a blot on his character, but it must

[10] Bury, *op. cit.*, p. 708.

be remembered that modern standards regarding bribery are different from ancient. Few public men could resist a bribe. Aristides, Pericles, Nicias, and Lycurgus are outstanding examples of honesty that was comparatively rare. It was always esteemed a venial offense to take a bribe for doing what was regarded as being in the best interest of one's country. This was the defense of every politician in the pay of Macedon. On this occasion Demosthenes admitted but tried to excuse his guilt. Unable to pay the huge fine of fifty talents which was inflicted by the court, he was imprisoned. He effected his escape, however, and went into exile from which he was soon recalled. He was one of the orators whose surrender was demanded by Antipater after the unsuccessful attempt to revolt from Macedonia upon the death of Alexander. When arrested he took poison and so escaped the executioner.

Aeschines (390–330? B.C.) was born of poor and humble parents and did not receive the education of a gentleman, as Demosthenes was fond of reminding him. His father kept a school, and Aeschines assisted in the instruction and performed the services of janitor. He was successively soldier, clerk, and actor. Being possessed of a fine voice and a handsome person, he was cast for the more showy parts. Demosthenes insists that he was a poor actor. Though he may have had some contact with Plato and Isocrates, as is asserted by Pseudo-Plutarch, he never had any specific instruction in rhetoric. In this respect he resembles Andocides.

Aeschines went into politics and for many years was the constant opponent of Demosthenes. He began his

political career with the party opposed to the schemes and designs of Philip, but soon changed and became an adherent of the Macedonian party. His own explanation was that he realized that it was impossible to oppose Philip with any hope of success. His political opponents, however, did not hesitate to suggest that he had more substantial reasons for changing his politics. It is clear that at best he was an opportunist with no deep-seated convictions. Consequently, he has suffered by comparison with the fiery-hearted Demosthenes who, in some respects, was more like a political agitator than a statesman.

Aeschines was either duped or bribed by Philip to support the Peace of Philocrates (346 B.C.). As interpreted by Philip it was most unpopular, and Demosthenes seized upon the opportunity to prosecute Aeschines for bribery. With him was associated Timarchus as prosecutor. With the purpose of discrediting the case against him Aeschines prosecuted Timarchus under a law which forbade a man who had prostituted his person and squandered his patrimony to speak before the people. Timarchus was found guilty, but Demosthenes nevertheless pressed the case against Aeschines who was acquitted by a narrow majority. It was not until after the battle of Chaeronea that an opportunity for revenge presented itself. Ctesiphon proposed that a crown be conferred on Demosthenes in recognition of his services to Athens. Aeschines attacked the decree as illegal both on technical and on substantial grounds. The trial, which was delayed for seven years, was the final test of strength between the two great rivals. Not a few strang-

ers resorted to the city to hear the most famous orators in Hellas. The speeches of both have been preserved—Aeschines, "Against Ctesiphon," and Demosthenes, "On the Crown." Demosthenes won a triumphant approval of his policy. Aeschines, having incurred a fine of 1,000 drachmas for not obtaining a fifth part of the votes,[11] left Athens. An ancient biographer, Pseudo-Plutarch, says he established a school at Rhodes. At a public exhibition he read his speech against Ctesiphon. When the audience expressed surprise that such a speech had not won, he said: "Ah, but if you had heard Demosthenes you would not say that." The three extant forensic speeches of Aeschines were all delivered by himself. Though he taught rhetoric in his later years he was not a professional speech-writer; he was a politician rather than a lawyer. For though his speeches were in form forensic they were in fact political. Nothing is known about the date and manner of his death.

Lycurgus[12] (390–324 B.C.), an elder contemporary and political ally of Demosthenes, belonged to an old priestly family whose members had been devoted to the service of the state. The family traditions turned him to religion and whole-hearted public service. For twelve years he was steward of the public revenues. Such confidence was placed in him that fully two hundred and fifty talents were intrusted to him by private individuals for safekeeping. One would expect the financial administration of such a man to be above suspicion, and yet his successor in office charged him with a shortage in his

[11] See p. 69.

[12] For a characterization of Lycurgas as a prosecutor see pp. 70–71.

accounts. In spite of serious illness he appeared before the people and silenced his accuser.

Fifteen titles of speeches by Lycurgus are known but only one is extant. Like Aeschines he was fond of quoting poetry to the jurors. But his lengthy and often inappropriate selections could hardly have been as acceptable as the lines declaimed by the handsome and sonorous-voiced ex-actor. Lycurgus never composed speeches for others. Indeed, he was not himself a ready speaker, and was even reproached for receiving help from experts in composing his own speeches.

Hyperides (389–322 B.C.) was at first associated with Demosthenes and proposed a decree in his honor after Chaeronea; but a breach occurred and Hyperides joined in the prosecution of Demosthenes for accepting bribes from Harpalus. Considerable portions of his speech have been recovered among Egyptian papyri. Apparently they were reconciled afterward for the surrender of both was demanded by Antipater on the ground that they were responsible for the anti-Macedonian policy of Athens. Substantially the whole of the funeral oration has survived which Hyperides delivered over those who fell in the war against Antipater. He drew many of his clients from the less respectable classes. Two of them, Lycophron and Euxenippus, were prosecuted by Lycurgus. His novel defense of Phryne, a beautiful courtesan, against a charge of impiety is justly famous. When in spite of his best efforts the judges seemed determined to condemn his client he suddenly stripped off her garments and displayed her beauty to the court, thereby winning her acquittal. When arrested

by the agents of Antipater it is said that he bit out his tongue that he might betray no one when put to the torture.

Dinarchus (360–? B.C.), the last and also the least of the ten orators, was, like Lysias, a resident alien. He came into prominence in connection with the Harpalus affair. His three extant speeches are all against men accused of accepting bribes—Demosthenes, Aristogeiton, and Philocles. He was most active as a speech-writer during the oligarchic régime established in Athens by Antipater after the death of Alexander. The only time he appeared in court as a litigant was when toward the end of his life he sued one Proxenus who abused his confidence and tried to defraud him of his property.

Outside of the Decade of the Orators there was a host of orators who devoted themselves to professional speech-writing for the courts. Of the forty forensic speeches attributed to Demosthenes nearly one-half are by unknown contemporaries whose work was good enough to be mistaken for Demosthenes. The same was true of others. Of the four hundred and twenty-five orations attributed to Lysias, Dionysius regarded only two hundred and thirty-three as genuine.

Under Macedonian rule oratory languished. Athens became a provincial town. Other cities like Alexandria and Pergamum succeeded Athens, the "School of Greece," as Pericles had called her. Oratory degenerated into declamation.

CHAPTER II

THE JUDICIARY

The administration of justice is one of the recognized functions of government. In Great Britain the king is in theory responsible for the administration of justice. All judges throughout the king's dominions are appointed by him or his representatives on the advice of ministers responsible to the various parliaments. It is so long since a British king has personally participated in the dispensing of justice by taking a seat on the bench with his deputies that this right has been forgotten if not lost. The pardoning power is a royal prerogative but in practice it is exercised by the home secretary in Great Britain. In the United States the advice and consent of the Senate take the place of the British ministerial advisory function; but the president, just as the king, appoints and commissions the judges of the national system. In the majority of the states of the Union the judges are elected; in a few the power of appointment lies with the governor. The president and the state governors have the power of pardon. In both countries juries are drawn by lot from the general body of citizens with the exception of some occupations and professions. The right of challenge on the part of plaintiff and defendant is intended to exclude the unfit.

The other branches of government—Parliament and Congress—exercise judicial functions only in the case of

impeachment. In Great Britain the Lords, in the United States the Senate, act as judges while the Commons and the Representatives, respectively, are the accusers and prosecutors. A committee known as "Managers" is appointed to conduct the trial. In Great Britain any subject may be impeached for any crime or misdemeanor. But this cumbersome procedure has been usually reserved for great offenders who could not otherwise be reached. Under the Stuart kings it was used as an instrument of parliamentary resistance to the crown. The best-known modern instance of impeachment is that of Warren Hastings in 1788–95. It has since fallen into desuetude. According to the Constitution of the United States, the president, vice-president, or any civil officer may be impeached for treason, bribery, or other high crimes and misdemeanors. The penalty is removal from office and disqualification for office-holding in the future. A successful impeachment may be followed by indictment, trial, and punishment in the regular tribunals. The most famous American impeachments are those of Justice Samuel Chase, of the Supreme Court, in 1805, and President Andrew Johnson in 1868. It is interesting to see how the makers of the American Constitution seized upon an outworn British institution and adapted it so effectively to their needs that it still serves a useful purpose both in federal and state governments.

In France the connection between the government and the judiciary was much closer than in Great Britain. From the middle of the eighth century the *cour royal,* or assembly of the great barons of the kingdom who sat

in council with the sovereign, was the chief judicial tribunal.[1]

In Great Britain and the United States judges are selected from the ranks of the legal profession; in France they are chosen from candidates who have specially prepared themselves for the judicial profession. In modern government, then, the administration of justice is in the hands of expert judges. In democratic Athens, however, the situation was quite the reverse. The senate, the popular assembly, called the Ecclesia, and all regular magistrates had well-recognized judicial functions. The various steps by which governments controlled and developed the administration of justice can be followed more easily in Greece than anywhere else. For this reason the early judicial history of Greece is of importance not only for an understanding of the Athenian system in the fifth and fourth centuries but also for a proper appreciation of many features of subsequent legal history. In the age of Homer (900–800 B.C.) the government was what Aristotle calls the "monarchy of the heroic age," which was hereditary and limited. There were neither codes nor tribunals. The individual resorted to self-help to obtain redress for wrongs committed against his person or his property. The habit of carrying arms encouraged and facilitated recourse to violence. Individuals were not left entirely to their own resources; relatives and friends were always expected to lend their aid. At times even the whole community concerned itself in the matter. When an outrage was committed by a member of another tribe the fellow-citizens of the victim joined

[1] Forsythe, *Hortensius or the Advocate,* p. 232.

him in demanding compensation. Under these circumstances it was only natural that communities should seek to prevent and punish acts of aggression by individuals likely to result in complications with their neighbors. The popular assembly was a convenient medium for community action. Anyone in distress might appeal to the assembled people provided the matter was of public import. On one occasion Eupeithes of Ithaca rendered his fellow-citizens liable to a claim for damages by joining in a raid on a neighboring friendly people. Incensed at his action the assembly condemned him to death, but his life was saved by the intervention of Odysseus, the king. Such rough-and-ready methods of popular justice were due to a conviction not yet embodied in law that wrongs committed, or suffered, by individuals might involve danger to the whole community and could be redressed only by community self-help.[2]

According to modern ideas, homicide is a heinous crime that can be effectively dealt with only by the state, but in the Homeric age it was the concern of the immediate relatives who dealt with it by means of blood feud or blood price as they deemed best. There was no move on the part of the community to intervene until men began to believe that the shedding of blood involved pollution. The polluted person became a menace to those with whom he came in contact; he must be either purified or banished. The desirability also of avoiding blood feuds which might endanger the tranquility if not the security of the state was an important influence in

[2] Bonner, "Administration of Justice in the Age of Homer," *Classical Philology*, VI, 12 ff.

bringing about state intervention. Special courts were constituted to try homicide cases. The restriction of the right to prosecute an alleged murderer to a near relative of the victim was due to religious conservatism.

A primitive form of trial by evidentiary oath is found in the age of Homer. In the *Iliad* Menelaus challenged Antilochus to swear that he did not win a horse race by a foul. The oath was refused by Antilochus, and the prize went to Menelaus. Had Antilochus taken the oath he would have received the prize. But the prevailing method of settling a dispute peacefully was by arbitration. A reluctant opponent was induced to submit a dispute to arbitration by means of a wager. A sum of money or an article of value was deposited by each litigant with a selected arbitrator who paid the deposits to the winner. Disputants, as is to be expected, preferred the services of the king or some other prominent person whose integrity and judgment inspired confidence. From the practice of selecting kings and chiefs as arbitrators arose the notion that the settlement of disputes was a royal prerogative. This is the justification of Aristotle's statement that "the king [in the heroic age] was a general and a judge and had control of religion." The famous trial scene depicted on the shield of Achilles along with other characteristic scenes from the daily life of the period shows a council of elders sitting in the market place adjudicating a case. The question at issue was whether a sum of money agreed upon as blood money for a slain man had been paid or not. The wager was a talent.

In the age of Hesiod,[3] beginning about 700 B.C., voluntary arbitration was replaced by a system of compulsory arbitration administered by the ruling aristocracy which had gradually supplanted monarchy. In effect it was a compulsory process of law since it could be invoked by any aggrieved person without securing the consent of his opponent. The dispensing of justice had by this time become a recognized function of government. But the petty chiefs who constituted the ruling aristocracy did not scruple to enrich themselves by accepting bribes. The popular dissatisfaction caused by this situation combined with the needs of a more complex social and economic organization aroused the people to demand written laws and rules of procedure as a protection against arbitrary decisions on the part of corrupt judges.

> No worse foe than a despot hath a state
> Under whom, first, can be no written laws,
> But one rules, keeping in his private hands
> The law: so is equality no more.
> But when the laws are written then the weak
> And wealthy have alike but equal right.[4]

In Athens early in the seventh century an aristocratic republic known as an "oligarchy" succeeded the monarchy. The change from hereditary kings to magistrates elected annually on the basis of wealth and birth was gradual. Eventually the functions of the king were distributed among nine magistrates called "archons." The chief of these was the Archon. He had jurisdic-

[3] Bonner, "Administration of Justice in the Age of Hesiod," *ibid.*, VII, 17 ff.

[4] Euripides *Supplices* 429 ff. (Way's trans.).

tion in civil suits involving estates and family relations. The Polemarch originally exercised the military functions of the king and had jurisdiction over aliens. The King Archon inherited the title and the religious functions of the king. The retention in a republic of this vestige of royalty was due to religious conservatism. Men shrank from abolishing the title of the official who represented them in their relations with the gods. Similarly, in the Roman Republic a religious official, the *rex sacrificulus,* retained the royal title. The remaining six archons known as Thesmothetae were judicial rather than political officials. There is some doubt as to their exact functions; but it seems fairly certain that they took cognizance of all cases outside the jurisdiction of the other magistrates and recorded judicial decisions.[5] The Areopagus—the senate that sat on Mars' Hill—was the lineal descendant of the elders represented on the shield of Achilles as administering justice, and was the governing body of the state. It served also as a criminal court. "The council of the Areopagus," says Aristotle, "had as its constitutionally assigned duty the protection of the laws; but in point of fact it administered the greater and the most important part of the government of the state and inflicted personal punishments and fines summarily upon all who misbehaved themselves."[6]

In the year 621 B.C. Draco gave Athens her first code. The only Draconian laws that have survived are those dealing with homicide. So severe were the punish-

[5] Gertrude Smith, *Administration of Justice from Hesiod to Solon,* p. 24.

[6] *Constitution of Athens,* chap. iii.

ments in his code that Demades, a contemporary of Demosthenes much given to phrase-making, said that Draco wrote his laws not in ink but in blood.

In 594 B.C. Solon, the great lawgiver, abolished all the laws of Draco except those dealing with homicide, and gave Athens a democratic constitution with a senate and a popular assembly. On the expulsion of the tyrants —the Pisistratidae—who ruled Athens for approximately fifty years, Cleisthenes revised the constitution in a democratic spirit. The constitution during the fifth and fourth centuries is substantially that of Cleisthenes. The Ecclesia, an assembly composed of all citizens, was the sovereign power in the state. Closely associated with it was the Senate of Five Hundred, a representative body chosen annually by lot from all citizens of thirty years of age or more. Fifty were selected from each of the ten tribes into which Cleisthenes divided the citizens. Each of these ten sections in turn constituted a committee called the Prytaneis which presided over the senate and furnished chairmen for the meetings of the assembly. The senate organized all business to come before the assembly, and exercised the main executive functions of government. The nine archons continued to perform their duties as under the aristocratic constitution though they were now selected by lot from a large group elected by the tribes. The higher offices in the state were filled from the first three of the four classes into which the citizens were divided on a basis of wealth. At the end of their year of office the archons were required to submit to an audit. Those who passed the audit became members for life of the Areopagus to which Solon had as-

signed "the duty of superintending the laws, so that it continued as before to be the guardian of the constitution in general. It kept watch over the citizens in all the most important matters and corrected offenders, having full powers to inflict either fines or personal punishments."[7] All these bodies and officials shared in the administration of justice, but the supreme judicial authority was vested in the sovereign people who normally dispensed justice only in the case of serious crimes such as treason, or offenses not otherwise provided for by law, though being untrammeled by constitutional limitations they might take action in any case. Regular judicial proceedings before the assembly were called *eisangeliae* (εἰσαγγελίαι). The term may be rendered by "impeachment" because like a modern impeachment it was a trial before a political body. Occasionally also a crime was brought to the attention of the people by means of a "presentment" (προβολή). A vote of acquittal ended the matter; a vote of condemnation though without legal effect usually encouraged the prosecutor to bring the charge before a regular court. Demosthenes "presented" Meidias to the assembly and afterward prosecuted him for assault and battery committed in the theater during a public festival. In some aspects this process is not unlike presentment by a grand jury; in other respects it resembles a resolution of Parliament or Congress. It was a mere expression of public opinion. Both impeachment and presentment could be initiated directly in the assembly. An impeachment could be tried at once or referred to a court. But the normal procedure was to in-

[7] *Ibid.*, chap. viii.

troduce an impeachment into the senate. If the charge seemed well founded the senate was empowered to inflict a fine not exceeding five hundred drachmas or to refer it either to the assembly or to a court for trial. Only the more serious cases were referred to the assembly.

Solon introduced two important innovations into legal practice and procedure. Heretofore only the aggrieved or injured party, or in case of homicide the immediate relatives, could institute proceedings. Draco, however, had allowed anyone to take action against a murderer who returned from exile without lawful permission or proper purification. The purpose of this exception to the general rule was to insure the population against the danger of pollution arising from the presence of an unclean person in their midst.[8] Solon extended this privilege to include all offenses except homicide. This exception was due to the religious background and ritualistic character of homicide trials. The other reform concerned the jurisdiction of the magistrates. It was obviously impossible to allow magistrates the unrestricted right to give final judgment in a democracy where the sovereign people claimed the right to exercise all functions of government. Accordingly a right of appeal from magisterial decisions was allowed to the people assembled in the Heliaea, a judicial assembly, as distinguished from the Ecclesia, a political assembly. All citizens, even those of the lowest class, were members of the Ecclesia, but only those of thirty years of age or more were

[8] Gertrude Smith, "Early Greek Codes," *Classical Philology,* XVII, 197.

eligible for membership in the Heliaea. There is reason for believing that a quorum of the Heliaea consisted of six thousand. It is known that in certain cases action by the people was not valid unless at least six thousand participated. For example, a citizen could not be ostracized or an alien naturalized unless at least six thousand voted. The same rule applied to all laws affecting the interests of individuals, *νόμοι ἐπ' ἀνδρί*, or *privilegia* as the Romans called them. It is only reasonable to suppose that equal care was taken to protect the interests of the individual in litigation. Consequently, when a popular court of appeal was instituted it was natural that it should consist of six thousand.[9] Occasionally the whole body of heliasts was convened, but normally they were drafted into sections called "dicasteries" (*δικαστήρια*). The members of these panels were always addressed as "dicasts," never as "heliasts." In fact, the name Heliaea is rarely found outside of official documents. The designation "heliast" seems to have been confined to popular speech. But modern writers constantly use the name "heliastic courts" for the popular tribunals of Athens.

It was the duty of the Thesmothetae—the six junior archons—to recruit the dicasts by lot from those who presented themselves for service, to administer the oath of office, and on requisition of magistrates and other judicial officers, to draft them into panels. The normal number of a panel was five hundred and one for public (criminal) cases and two hundred and one for private (civil) cases. As a majority determined the verdict an odd number was required to avoid the possibility of a

[9] Bonner, "Minimum Vote in Ostracism," *ibid.*, VIII, 223 ff.

tie. Occasionally larger panels were employed for important cases. References to fifteen hundred and even six thousand occur.

Just as the Heliaea represented the whole people judicially, so by a curious fiction this representative character was extended to each panel which litigants constantly identify with the sovereign people. They were addressing the Athenians in the persons of a representative commission. The dicasts were the only citizens performing official public services who were not required to submit to a scrutiny at the end of the year to answer charges connected with their office. They were not like other officials the servants of the people; they were the people. This is what an ancient writer on the Athenian constitution means when he says: "In Athens cases are tried by the people."

Cleisthenes (508 B.C.) strengthened the popular courts by making them courts of first resort instead of courts of appeal. The immediate effect of this innovation was to alter very materially the judicial duties of the magistrates. Their functions were now twofold. A survival of their pre-Solonian right to pass final judgment on all cases that came before them was their right to punish offenses against their authority within the sphere of their executive and administrative duties. In this way they could deal at once with opposition and disobedience that might otherwise hamper them seriously in the performance of their duties. The Romans called this coercive power of their magistrates *coercitio*. The power is analogous to the power of a modern judge to punish recalcitrant persons in his court for contempt. If the small

fine the magistrate was empowered to inflict was in his estimation inadequate he could turn over the offender to a popular court for trial. This was a relatively unimportant judicial function. The really important rôle of the magistrate in litigation was the duty of preparing for trial the cases that came within his jurisdiction in the course of preliminary hearings (ἀνάκρισις). Upon application the Thesmothetae assigned the magistrate a jury to try the case under his chairmanship. He bore no resemblance to the modern judge; he was rather the chairman of a public meeting, the presiding officer of an Ecclesia in miniature. In fact, in this connection the magistrate bore much the same relation to the dicasteries as the senate bore to the Ecclesia; they merely organized and presented the business to be transacted at each session.

As litigation increased the regular magistrates were unable to cope with it and special judicial officers and boards were appointed with powers similar to those of the magistrates acting as judicial officials. The distribution of cases among the various officials and boards has been fairly accurately determined by modern investigators on the basis of the ancient handbooks, lexicons and scholia, and the remains of forensic oratory. As a rule, well-defined principles were followed, but in a number of instances the assignments were purely arbitrary.

A number of changes were introduced into the judicial system between the reforms of Cleisthenes and the age of Demosthenes. Some were improvements suggested by experience, others were required by the progress of democracy. Some also were intended to relieve the

congestion of the courts, which was due in large measure to the transference of the more important cases from the subject cities of the empire to Athens for trial. Only the more significant of these changes need be noted here. About the middle of the fifth century Pericles made provision for paying the jurors a small fee. Ostensibly a political maneuver on his part in the struggle with the wealthy Cimon, it was justified by the growing difficulty of securing a sufficient number of panels to cope with the marked increase in litigation. In 425 B.C. a substantial increase in pay was made by the demagogue Cleon. This was frankly a political move to enlist the support of the masses to whom jury service now became very attractive. Shortly after the reforms of Solon, Pisistratus set up a tyranny which endured for fifty years. Apparently he made no drastic constitutional change, contenting himself with filling the offices with his friends and adherents. But one of his judicial reforms deserves mention because it was later adopted by the restored democracy. He appointed judges to go on circuit throughout the Attic townships. The importance of this innovation lies in the fact that they were primarily arbitrators,[10] for although they were empowered to give a binding decision their first endeavor was to induce disputants to reach a compromise. On the expulsion of the tyrants they were abolished, but by the middle of the fifth century thirty circuit judges were again instituted to relieve the congestion of the courts. Of their work nothing is known, but it may safely be assumed that just as their predecessors they were both arbitrators and

[10] Bonner, "Institution of Athenian Arbitrators," *ibid.*, XI, 191.

judges. After the overthrow of the Thirty Tyrants, whose hated name they recalled, they were replaced by a Board of Forty who held sittings in Athens only. The arbitral functions of the thirty rural justices were assigned to public arbitrators whose decisions were subject to appeal. If they failed to settle a case it went to the Forty for trial. Thus arbitration was compulsory in all cases that came within the jurisdiction of the Forty. Each citizen, on completion of his military service at the age of sixty, served as arbitrator for one year. "The public arbitrators were one of the most interesting products of Athenian democracy. The design of the system was excellent, to procure the settlement of private suits by experienced and impartial men whose aim was to make peace."[11] Another innovation closely associated with the institution of arbitration was the requirement introduced early in the fourth century that testimonial evidence should be presented in the form of affidavits acknowledged by the witnesses in court. The purpose of this change was to insure that appeals should be based on the evidence as originally presented. The subsequent extension of the practice to all but the homicide courts was in part due to a desire to expedite litigation and in part to the natural tendency toward uniformity.[12]

Immediately after the expulsion of the Thirty Tyrants (403 B.C.) an amnesty was arranged between the opposing factions according to which no one except the Thirty and some of their subordinates was to be prose-

[11] Wyse in Whibley, *Companion to Greek Studies,* p. 386.

[12] Bonner, *Evidence in Athenian Courts,* pp. 46 ff.; cf. "Evidence in the Areopagus," *Classical Philology,* VII, 450.

cuted for crimes and misdemeanors committed during the régime of the Thirty Tyrants. In order to block more effectively the frequent attempts that were made to evade the provisions of the amnesty, any defendant haled into court contrary to its provisions was permitted to enter a special plea that the case was not actionable.[13] The παραγραφή as it was called covers both the special plea and the demurrer of Anglo-American practice. The burden of proof was thrown upon the plaintiff, and the defendant spoke first at the trial held to determine whether the proposed action was in fact contrary to the terms of the amnesty. This special plea was soon extended to include other matters such as *res judicata,* the statute of limitations, and accord and satisfaction. This laudable attempt to separate technical matters from the main issue was not wholly successful because litigants invariably insisted on discussing the whole case on its merits. Impeachment in the senate or the assembly (εἰσαγγελία) was originally designed for the trial of serious offenses, but a practice grew up of using this procedure for quite trivial offenses, such, for example, as paying more than the maximum legal wages to flute girls. The abuse arose in all likelihood from the desire to escape the delays and technicalities of the ordinary procedure, as well as the danger of incurring the fine imposed on the plaintiff who failed to secure at least one-fifth of the votes of a heliastic court. Accordingly, a law was passed about the middle of the fourth century specifying the cases that could be tried by impeachment.

Athenian homicide courts were organized quite dif-

[13] Calhoun, *Classical Philology,* XIII, 169 ff.

ferently from the others. The Areopagus was reputed to be the most ancient homicide court in Greece. Foreigners and even gods are said to have resorted to it. From early times in addition to general criminal jurisdiction it tried all cases of homicide, but after the differentiation of voluntary, involuntary, and justifiable homicide four additional courts were instituted. Voluntary homicide, wounding with intent, poisoning, and arson came within the jurisdiction of the Areopagus under the chairmanship of the King Archon who, unlike the magistrates who presided over the sittings of the heliastic courts, actively participated in the trial. The court of the Palladium tried cases of involuntary homicide and of killing noncitizens, i.e., slaves, resident aliens (*metics*), and transient foreigners. The court of the Delphinium tried cases of justifiable homicide, such as killing in self-defense. The court at Phreatto tried those who, while in banishment for involuntary homicide, were charged with murder or wounding with intent. The defendant made his defense from a boat before a court seated on the shore. In this way the pollution of Attic soil was avoided. Such cases must have been of rare occurrence. These three courts were at first each composed of fifty-one special judges called ἐφέται, recruited from the membership of the Areopagus. But sometime during the fifth century the Ephetae were replaced by regular jurymen. This change doubtless occurred when the Areopagus was deprived of its political and judicial powers about the middle of the fifth century.[14] The court of the Prytaneum,

[14] Gertrude Smith, "Dicasts in the Ephetic Courts," *Classical Philology*, XIX, 353 ff.

consisting of the tribal kings under the presidency of the King Archon, tried unknown slayers and animals and inanimate objects that had caused the death of a human being. Condemned objects were cast beyond the borders of Attica. A similar practice is found in Anglo-Saxon law; condemned objects were called "deodands."

CHAPTER III

PRACTICE AND PROCEDURE

The modern division of suits into criminal and civil was unknown in Athens. Suits were either private (δίκαι) or public (γραφαί) according as the interests of the individual or those of the state were mainly involved. Any citizen could bring a public suit, but only the parties concerned or their legal representatives could institute a private suit. Homicide cases were classified as private suits because only near relatives could prosecute. The state, however, exacted the penalties as in public suits. A considerable number of private suits were subject to arbitration. With this exception the practice in public and private suits was substantially the same. In the main, public suits correspond to criminal and private suits to civil with the exception of homicide cases. Suits were further classified as assessable (τιμητοί) and non-assessable (ἀτίμητοι) according as the penalty was assessed by the jury or fixed by law or a previous agreement of the parties. The trial of Socrates as depicted by Plato is a good example of a suit in which the jury assessed the penalty.[1]

More than one hundred types of suits, private and public, are mentioned in the sources, such as slander, assault, impiety, perjury, etc. These were distributed among a dozen or more boards and magistrates. To ad-

[1] For the trial of Socrates see pp. 250 ff.

ministrative officers were assigned the cases that fell within the sphere of their official duties. The chief archon had charge of orphans and widows. Consequently, suits affecting their interests came before him. His court corresponds roughly to modern probate and chancery courts. The Polemarch, as the name indicates, originally was the commander-in-chief of the military forces; but under the democracy he ceased to be a military officer. His jurisdiction over cases involving non-citizens, i.e., freedmen and resident and transient aliens, is a survival of the ancient military duties of the office. Strictly military offenses came before the ten generals. The King Archon inherited the chief religious functions of the kingship, and so dealt with cases of sacrilege and homicide. The assignment of cases to purely judicial officials was of necessity somewhat arbitrary. As a rule, civil suits arising out of contractual relations came before the Forty. Criminal cases in the modern sense, exclusive of homicide, came before the Thesmothetae except a special class, including different kinds of thieves known as "malefactors" (κακοῦργοι), reserved for the Eleven who, like the modern sheriff, had charge of prisons and the incarceration and execution of criminals. There was a class of cases known as "monthly suits" because they must be brought to trial within a month. This preferential treatment was accorded, among others, to cases regarding dowry, corporations, banks, and, after the middle of the fourth century, commercial suits. These cases, with the exception of commercial suits, were handled by a special board called the "Introducers" (εἰσαγωγεῖς). The various exceptions to these working

rules were in all probability not so formidable to the Athenian citizen who as litigant, juror, or spectator became more or less familiar with litigation in its different phases as to the modern student who gleans his information from handbooks.

Litigation both public and private ordinarily began with a formal summons to the defendant to present himself before the proper magistrate on a specified day. But there were a number of exceptions. "Malefactors" and persons exercising rights of citizenship of which they had been deprived by way of punishment might be summarily arrested *flagrante delicto* by any citizen and haled forthwith before the proper magistrate (ἀπαγωγή). Instead of himself arresting the criminal the citizen might point him out to the magistrate (ἐφήγησις) or lodge a written information and leave further action to the magistrate and his assistants (ἔνδειξις). The citizen who was responsible for the arrest of a criminal in any of these ways exercised the functions of both prosecuting attorney and complaining witness when the trial took place. So far as is known, he ran no risk of being sued for damages for false arrest if the accused had wrongfully been put on trial. But if he failed to receive at least one-fifth of the votes of the jurors he incurred a fine of one thousand drachmas.[2] In proceedings before the assembly (ἐκκλησία) the Prytaneis (presiding committee) summoned the accused. In claims to an estate called "interpleader" (διαδικασία) there was no need of a summons because lists of vacant estates were published monthly. In all other cases both public and pri-

[2] About $200; cf. "Table of Attic Money," p. 272.

vate, including "denunciation" (φάσις), a special form of action employed in cases of infractions of customs or mining laws, and the process known as "inventory" (ἀπογραφή) to recover state debts or state property wrongfully in the possession of an individual, the person who instituted proceedings summoned the defendant orally in the presence of two witnesses to appear before the magistrate in whose jurisdiction the case lay.

It was the business of the plaintiff to determine what kind of process the law prescribed for his grievance. Sometimes a choice of remedies was available. If the contemplated procedure required it he must summon the defendant before the proper judicial official. No previous arrangement with the magistrate was necessary. He must, however, observe legal holidays and other periods during which, according to law, certain classes of cases could not be heard. For example, three monthly hearings must precede a homicide trial. As the same magistrate must conduct the entire case it is obvious that a case could not be started during the last three months of the King Archon's tenure of office. Similarly commercial suits were not heard during the season of navigation. If the defendant failed to appear he was liable on proof of service of summons to lose the case by default unless a representative made oath (ὑπωμοσία) that for good and sufficient reasons he was obliged to be absent. If both parties were present the magistrate proceeded with the preliminary hearing of the case (ἀνάκρισις). The preliminary hearing was a survival of the earlier practice adapted to the new conditions. So long as a magistrate

pronounced either a final verdict[3] or one subject to appeal[4] he required all the evidence in the case. But after the reforms of Cleisthenes the popular juries became courts of first and final resort and the magistrate needed only enough evidence to enable him to determine whether the case came within his jurisdiction, whether there was a legal right of action, whether the plaintiff was competent to bring action, and whether the time and form of action were according to law. But as a magistrate was liable to removal from office during tenure, and to prosecution on conclusion of his tenure, for malfeasance in office he preferred to err on the safe side and rarely ventured to reject a case except on the clearest grounds. Naturally defendants were desirous of having all the evidence produced at the preliminary hearings in order that they might be able to meet it more effectively. Occasionally they used expressions that have been hastily interpreted by some investigators to mean that all evidence had to be produced. This view is not warranted by the facts. For there are cases in which it is clear that a speaker did not know what evidence his opponent intended to produce in court. And in at least one instance decisive evidence was withheld until the trial. A man was charged with killing a female slave. As a matter of fact, the woman was not dead. The defendant succeeded in locating her, but being determined to catch the plotters who had concealed her he kept his discovery secret until the trial, when he produced the woman alive and well to the utter confusion of the prosecutor and fifteen

[3] Before the reforms of Solon.

[4] Under the Solonian constitution.

witnesses who had sworn that the woman was dead. Obviously the defendant did not disclose his evidence at any of the preliminary hearings of the case.

In private suits both parties paid fees of three drachmas where the damages claimed ranged from one hundred to a thousand drachmas, and thirty drachmas for higher damages. In public suits the prosecutor paid a small nominal fee except in the case of "denunciation" and "inventory" where the fees were the same as in private suits. This exception was due to the fact that the successful prosecutor shared in the money recovered for the state. A deposit of one-tenth of the amount claimed was required of those who laid claim to a disputed estate, and one-fifth from those who were claimants of confiscated property.

The pleadings were filed at the preliminary investigation. The following is the indictment of the notorious Alcibiades in 415 B.C.

> Thessalus son of Cimon of Lacia lays information that Alcibiades son of Clinias of Scambonidae has committed a crime against the goddesses Ceres and Proserpina by representing in derision the holy mysteries, and showing them to his companions in his own house where being habited in such robes as are worn by the chief priest when he shows the holy things he named himself the chief priest and Polytion the torch bearer, and Theodorus of Phegaea the herald; and saluted the rest of the company as initiates and novices. All this was done contrary to the laws and institutions of the Eumolpidae and the heralds and priests of the temple.

Both the plaint and the answer in *Apollodorus* v. *Stephanus* are found in a speech attributed to Demosthenes. "Apollodorus son of Pasion of Acharnae against Stephanus son of Menecles of Acharnae. Damages one tal-

ent.[5] Stephanus gave false testimony against me, to wit, that which is written in the deposition." In all probability the deposition was annexed. The answer of the defendant Stephanus is as follows: "Stephanus son of Menecles of Acharnae says: I gave true testimony in testifying that which is contained in the record." The answer of the defendant might be either a direct denial like that of Stephanus or an allegation that on grounds either of law or fact the matter was not actionable. In the older practice if the defendant took exception to the plaint the plaintiff had the prior right to put forward a witness that the matter was actionable. To meet this move the defendant must prosecute the witness for perjury. If, however, the plaintiff failed to take this step the defendant must support his exception by the testimony of a special witness whom the plaintiff must successfully prosecute for perjury before he could go on with the original suit. In the fourth century this proceeding (*διαμαρτυρία*) is found only in inheritance cases. Where sons of the deceased were in possession they met claims to the estate by producing a witness who swore that the estate could not be claimed at law because there were legitimate sons. If the claimants succeeded in convicting the witness of perjury their claim went to trial, otherwise it was dropped. All other exceptions were taken in the form of a *παραγραφή*, a term which embraces both the special plea and the demurrer of English common law, for Athenian practice made no distinction between law and fact. The following examples will exhibit the scope of the *παραγραφή*. It was used where it

[5] A talent (6,000 drachmas) was worth about $1,080.

was alleged that a release and discharge had been given, that the matter was *res judicata,* that it had been settled by arbitration, that the time for bringing action had expired, that the wrong kind of action had been brought, that several causes belonging to different jurisdictions had been combined. The issue thus raised was tried separately, and the defendant spoke first. There was a distinct advantage in getting the ear of the jury first but this advantage was partially neutralized by the shifting of the *onus probandi.* If the defendant failed to prove his case he could resume the suit by filing a straight denial (εὐθυδικία). If he succeeded his opponent must drop the case unless the exception was to the form of the action. In this event he could recommence the action in the proper form.

Both parties were required to swear to their pleadings. Plato severely criticized a requirement of the law which obliged half the litigants in Athens to take a false oath. The practice doubtless is a survival from primitive times when an accused person was allowed to clear himself by a solemn oath[6] known as an "evidentiary oath." In course of time the privilege was extended to the plaintiff also under certain restrictions. Finally, it became a mere formality comparable to the modern plea of "not guilty." A copy of the pleadings was filed in the record office; an abstract was published by being posted in a public place.

All cases that came before the Forty comprising the bulk of civil suits received special treatment. Those in-

[6] Bonner, *Evidence in Athenian Courts,* p. 74; Gertrude Smith, *The Administration of Justice from Hesiod to Solon,* pp. 55 ff.

volving less than ten drachmas were tried without a jury by the four members of the Forty that represented the tribe of the defendant. Their judgment was final. Cases involving sums above that amount were assigned to a public arbitrator who first made an effort to effect a compromise. If he failed he gave his decision on the basis of all the evidence. His award was subject to appeal. To facilitate appeals all testimonial evidence was reduced to writing. As a rule no further evidence could be introduced. The same members of the Forty presided over the jury that tried the appeal. Amounts up to ten drachmas were exempted from arbitration presumably to prevent such trifling cases from finding their way into a heliastic court by way of appeal. The Committee of the Forty may very well have afforded litigants an opportunity to effect a settlement of these trifling cases. Compared with modern affidavits the depositions of Athenian practice were brief and simple. Witnesses were required to appear in court and acknowledge their depositions when read by the clerk. No opportunity for cross-examination was permitted. In some of Demosthenes' speeches depositions have been preserved. Even if they are spurious, as some scholars maintain, they nevertheless were composed by men who were familiar with Athenian practice. The following depositions are found in *Androcles* v. *Lacritus,* a speech attributed to Demosthenes:

> Ergasicles deposes that he was pilot of the ship of which Hyblesius was owner, and that he knows that Apollodorus carried in the ship 460 five-gallon casks of Mendean wine, and no more; and that Apollodorus carried no other merchandise to Pontus. . . . .

Aratus of Halicarnassus deposes that he lent Apollodorus eleven minas[7] of silver upon the merchandise which he was carrying in the ship of Hyblesius to Pontus, and upon the goods purchased there as return cargo, and that he did not know that he had borrowed money from Androcles.

The oral testimony of witnesses under the practice of the fifth century was equally simple. The record of an examination has been preserved in Andocides' defense against a charge of profaning the sacred mysteries of Demeter and Persephone. Diognetus, a member of a special commission appointed to investigate the mutilation of the Hermae and the profanation of the mysteries in 415 B.C., was called by Andocides to confirm a list of men denounced by an informer at that time.

Were you a criminal commissioner, Diognetus, when Pythonicus impeached Alcibiades in the assembly?

I was.

Did you know that Andromachus gave information regarding what took place in the home of Pulytion?

I did.

Are these the names of the men against whom he gave information?

They are.

In homicide cases witnesses were sworn; in other cases the oath was administered only when the other side demanded it.

Slaves were not competent witnesses. Their testimony extracted by torture could be used only with the consent of the other side. A litigant who desired the evidence of his own or his opponent's slave challenged him at the preliminary hearing or at any time before the con-

[7] A mina (100 drachmas) was worth about $18.

clusion of the case to permit the introduction of the statements of the slave in question. He might propose to take evidence on a particular point to be submitted to the jury, or to settle the whole case without further litigation according to the slave's answers to specified questions. Slave evidence is often praised and occasionally depreciated but rarely, if ever, introduced as the result of a challenge. In spite of impassioned statements to the contrary, there was no real confidence in such evidence. In the extant cases there is no instance of the acceptance of such a challenge. This is not conclusive proof, however, that they were never accepted, for if they involved the whole issue the case would never have come to trial.

In primitive times trial by evidentiary oath either of the party alone or with oath-helpers was common. The oath-helpers swore that his oath was true. The evidentiary oath was common in early English practice, and even appears in Massachusetts in Colonial times; but in fourth-century Athenian practice such oaths could be offered only by consent as the result of a challenge. Women were not competent witnesses except in homicide cases. The only method of securing the testimony of a woman in other cases was by a challenge to settle a single disputed point or the whole issue on the basis of her sworn statement. Challenges to accept an oath were rarely accepted. This virtual exclusion of all testimony of women who lived in almost oriental seclusion is not so serious a matter as it would be in a modern community where women participate freely in the social and business life of the community. It was customary, however,

for defendants even in comparatively unimportant cases to have their children and female relatives appear in court to excite the pity of the judges.

The dicasts were assigned to the different courts under the presidency of the proper official according to a most elaborate system, the purpose of which was to prevent bribery. The chairman, with the assistance of a clerk, heralds, and police, was responsible for the conduct of the case but he did not in any way participate either in the discussions or in the verdict. He had no power to exclude improper evidence or to force the speaker to confine his remarks to the issue. When a case was called for trial it went by default if either party failed to appear unless he had procured a representative to confirm by oath his reasons for being absent and to ask for an adjournment. The other side was permitted to submit an oath denying the sufficiency of the reasons given and to oppose the application. The issue was determined by the jury. If both the parties appeared the clerk read the plaint and the rejoinder. The law required each man to present his own case but under exceptional circumstances permitted a representative to speak for him. On the conclusion of the main speeches relatives and friends might, with the permission of the jury, make brief addresses usually in the nature of character evidence. An inexperienced litigant could always procure the services of a professional speech-writer to prepare an address for him and to advise him generally as to the conduct of his case.

All evidence was in the hands of the clerk when the court opened, and was read when called for by the

speaker. During the reading of the depositions and other documents the water clock, which measured the time allotted to each speaker, was stopped. In some cases speeches in rebuttal were allowed. On the conclusion of the speeches the jury voted secretly by ballot without any formal discussion of the case. A majority determined the verdict. If the verdict was against the defendant in a suit in which the jury assessed the penalty a second trial was held at once to determine the penalty or damages. The choice lay between that demanded by the plaintiff and that suggested by the defendant. The plaintiff was at liberty to reduce the penalty set down in the pleadings if it seemed advisable to him in view of the demonstrated attitude of the dicasts.

In criminal (public) suits the state exacted the penalty imposed by the court; in a civil suit the judgment was executed by the successful litigant himself. If the judgment was not satisfied within the period fixed by law, the plaintiff was empowered to make such seizures as were necessary to satisfy it without official assistance. If he encountered resistance he could bring an action for ejectment which transferred the title and carried a fine equivalent to the value of the property withheld. The recalcitrant defendant thus became a state debtor, and suffered disfranchisement. If there was no property upon which to levy, the defendant could still be adjudged a state debtor. A judgment debtor could not be imprisoned except in commercial suits to enable merchants to realize on a judgment without undue loss of time.

Strictly speaking, there was no appeal from the judgment of a heliastic court; but the award of an arbi-

trator or the verdict of a jury might be set aside if the case had gone by default. A period of two months was allowed for bringing action to set aside a verdict by default. A new trial was also allowed as the result of a successful prosecution for perjury on the part of a witness provided notice of intention to prosecute was given in open court before the verdict was rendered. Perjury included illegal as well as untruthful evidence.

The practice in the homicide courts was archaic and closely approximated a religious ritual. In the midst of many fundamental changes introduced into Athenian practice in the three centuries between Draco and Aristotle procedure in homicide cases remained almost unchanged. Three preliminary hearings were held by the King Archon at intervals of a month. Only relatives of the deceased within the relationship of second cousins could prosecute.[8] In the case of a murdered slave the master prosecuted. The defendant was forbidden by proclamation to frequent public places, and the trial was conducted in the open air. At any time before making his defense even after the beginning of the trial a defendant could escape further trouble by withdrawing from Attica. But if he elected to stand trial he must abide by the verdict. Both parties took an especially solemn oath. Two speeches were made on each side. All witnesses were required to swear to the guilt or innocence of the accused. Contrary to the fourth-century

[8] In case there were no near relatives of the deceased, anyone could arrest the murderer if he frequented public places contrary to the proclamation. He was then tried as a polluted person. If he obeyed the proclamation he could not be molested.

practice in the heliastic courts, testimonial evidence was not reduced to writing, and women and children were competent witnesses.[9] The statement frequently found in modern handbooks that slaves were competent to testify in homicide courts is due to a misinterpretation of a passage in one of Antiphon's speeches.[10]

[9] Bonner, "Did Women Testify in Homicide Cases in Athens?" *Classical Philology*, I, 127 ff.

[10] Bonner, "Evidence in the Areopagus," *ibid.*, VII, 450 ff.

CHAPTER IV

PROSECUTORS AND SYCOPHANTS

No judicial system can function properly without adequate provision for initiating legal proceedings. As an Athenian orator puts it:

> The three most important provisions for guarding and preserving democracy and the welfare of the state are the established laws, the legal processes, and the verdicts of the courts. For it is the function of the law to proclaim what ought not to be done, of the accuser to denounce those who are liable to the penalties prescribed by law, and of the judge to punish those who are thus brought to justice. Consequently neither the law nor the verdict of the judge is of any avail without someone to bring offenders to justice.

In Athens as in all modern jurisdictions, private (civil) suits could be instituted only by the parties concerned, or their legal representatives if they were women, minors, or aliens. In criminal matters two important differences in the manner of seeking redress appear. In modern states crimes are prosecuted in the name of the government, whether monarch or people, by trained jurists appointed or elected for the purpose. But there were no official prosecutors in Athens. A law of Solon permitted any citizen in good standing to prosecute a criminal. Homicide cases, however, were classified as private suits and only near relatives of the deceased could initiate legal proceedings, though the penalties—death or banishment—were exacted by the state as in public (crimi-

nal) suits. The Athenian conception of other crimes was similar to our own, namely, that certain wrongs are injurious to the public at large whether like treason they affect the whole community or like robbery only individual citizens. Solon believed that "the best governed state was that in which those who were not wronged were no less diligent in prosecuting wrongdoers than those who had personally suffered. Citizens like members of the same body should feel and resent one another's injuries."

Modern trials are conducted by experts. Although the jurymen are drafted from the community at large, the prosecutor, judge, and defendant's counsel are all trained lawyers. Under the system instituted by Solon an Athenian trial was entirely in the hands of amateurs. The presiding magistrate was selected by lot, the dicasts were drafted from the whole citizen body, any citizen could be prosecutor, and the defendant conducted his own case. Apparently there was no lack of volunteer accusers. Often several prosecutors were associated in a case. Thus three joined in the prosecution of Socrates for impiety. The reasons for the readiness of citizens to assist in enforcing the laws and checking crime are not far to seek. Athens like other Greek communities made large demands upon its citizens for public service of various kinds. The system engendered high ideals of citizenship. Public opinion played an important part in inducing citizens to share in the business of the state. A man who persistently refrained from public service was called ἀπράγμων, which may be rendered "shirker" or "slacker" although no English rendering is quite ade-

quate. The epithet carried a reproach which few men would willingly incur. A good record in public service was an asset for a citizen if ever he had to appear in a court of justice, while the reputation of being remiss brought a corresponding disadvantage. Litigants made a practice of reciting their own services to the state and denying or belittling those claimed by their opponents. It is evident that Socrates' failure to participate in public affairs was used against him at his trial.

In certain types of action financial inducements were offered to prosecutors. Athenians were very jealous and resentful of attempts of citizens to defraud the public treasury or of aliens to participate in the privileges of citizenship. Special forms of action were provided to meet these abuses, and citizens were encouraged to be watchful of the public interest by the prospect of receiving a liberal percentage of all moneys recovered or fines levied. Denunciation (*φάσις*) was the form of action used against those suspected of a breach of the laws relating to trade, customs, and mining. Successful prosecutors received one-half of the proceeds. Inventory (*ἀπογραφή*) was the form of action used to recover public property unlawfully held by private persons. Common examples are state debtors who concealed their effects or relatives of condemned criminals who concealed confiscated property. The successful prosecutor received three-fourths of the money realized. Aliens were not permitted to marry Athenians under penalty of being sold into slavery. One-third of the proceeds of the sale of the property and person of the convicted alien was assigned to the prosecutor.

Young men with political aspirations frequently sought to advance their fortunes by prosecuting some public offender. And active politicians regularly tried to ruin their opponents by haling them into court usually for bribery, corruption, misappropriation of public funds, illegal legislation, and other offenses that affected the community as a whole. Pericles made his political début with great credit by prosecuting Cimon for accepting bribes in connection with his military command.

In regard to wrongs that affected the property or person of an individual such as slander, robbery, assault and battery the aggrieved party could be relied upon to bring the offender to justice particularly when public opinion fully approved. Personal enmities could also be counted upon to swell the list of prosecutors. It was not generally regarded as immoral to retaliate in the case of a personal enemy. "It appears," says Aeschines, "that what is frequently said of public suits is no mistake, namely that private enmities correct public abuses." Fortunate indeed was the man who could catch his enemy in a breach of the law. The jurors quite understood and sympathized with this point of view which the litigant did not hesitate to divulge in court. Lycurgus is no doubt giving a new turn to a common sentiment when he says: "It is the duty of a good citizen to regard as personal enemies those who are guilty of any wrongdoing against the state."

The practice of intrusting criminal prosecutions to volunteers, excellent though it was in many ways, was responsible for serious abuses. Not only did personal foes and political rivals in their zeal lodge many frivo-

lous, vexatious, and even false accusations, but honest and well-meaning citizens in their anxiety to do their full duty to the state became overzealous and officious. This was bad enough in the estimation of a people who abhorred excess in anything, but when clever and unscrupulous men began to make a profession of laying accusations for gain they became as great a terror to honest citizens as to evildoers. For as they were always ready to accept "hush money," false accusations served their turn as well as true. These professional accusers were known as "sycophants." This is not the English word meaning "flatterer" but a mere transliteration of the Greek *συκοφάντης*.[1] As used by the orators this word has various connotations which make it difficult even for a Greek to define. The following attempts at definition are found in the forensic speeches. According to Demosthenes, the sycophant "is one who makes all kinds of charges and proves none." Their business, says Lysias, "is to involve in accusation even those who have done no wrong, for from them they can obtain the greatest gains." A further advantage of false accusations according to Isocrates was that "by displaying their powers against those who have done no wrong they get more money from those who are clearly guilty of crimes." Aeschines explains that the term was commonly applied to any kind of rascal without reference to litigation at all. Kennedy, the English jurist who translated Demosthenes, has devised a comprehensive definition that includes most of the extensions in meaning that are current

[1] Lofberg, "The Sycophant-Parasite," *Classical Philology*, XV, 61 ff.

in forensic literature. "The term suggests a happy compound of common barrator, informer, pettifogger, busybody, rogue, liar, and slanderer. It included calumny, conspiracy, false accusation, malicious prosecution, threats of legal proceedings to extort money, and generally, all abuse of legal processes for fraudulent purposes."[2]

The sycophant was fond of masquerading as a watchdog; he was always posing as a public benefactor. Aristophanes in the *Plutus* represents a sycophant who had been deprived of his livelihood by the imaginary reforms portrayed in the comedy as claiming that he is an indispensable public benefactor.

SYCOPHANT: Alas! What a shame that I good and patriotic citizen that I am should be so abused.

NEIGHBOR: You a good and patriotic citizen?

SYCOPHANT: As never man was.

NEIGHBOR: How do you make a living?

SYCOPHANT: I superintend all public and private affairs.

NEIGHBOR: You do? Why?

SYCOPHANT: I want to. Is it not my duty to help the city to enforce the laws and hinder men from doing wrong?

NEIGHBOR: But does not the state appoint judges for just that purpose?

SYCOPHANT: But who accuses?

Anyone who wants to [ὁ βουλόμενος],

replies the neighbor in the language of Solon's law which permitted anyone who pleased (ἐξῆν τῷ βουλομένῳ) to prosecute. "Well I am the one who wants to," responds the sycophant.[3]

[2] Quoted by Lofberg, *Sycophancy*, ix.

[3] Lofberg, *op. cit.*, p. 2.

There are abundant indications in literature that sycophants were both numerous and formidable. Aristophanes constantly ridicules them. In the *Acharnians* one is sold to a Boeotian trader who asks in exchange for his wares some commodity not produced elsewhere. In the *Birds* two Athenians set out to found a city where they can live at peace free from litigation and sycophants. It would appear that occasionally in real life wealthy and prominent citizens found it to their advantage to go into exile to escape persecution at the hands of the professional accusers. In the *Symposium* of Xenophon, Charmides congratulates himself that he has lost all his money and is reduced to poverty since now he is no longer compelled to fawn upon the sycophants.

Further proof of the prevalence of sycophancy is found in the constant efforts of litigants to avoid being regarded as sycophants. When a man says, "It is not by reason of fondness for litigation that I have brought this suit"; or "I have tried by every possible method to come to terms with the defendant"; or "I have never brought a public suit against a citizen nor have I harassed anyone when he was passing his accounts," it is evident that he desires the jury to understand that he is not a professional accuser. And a litigant frequently brings a general charge of sycophancy against his opponent to ward off suspicion from himself. "Not as a sycophant have I brought this suit, but because I myself was vexatiously prosecuted." "My opponent is an exceedingly clever speaker and is very familiar with the courts." "The case against me has been trumped up."

Sycophants flourished especially under democracy.

Many of their victims belonged to the better class that favored oligarchy or a less extreme form of democracy. Accordingly, it is not surprising to find that one of the first acts of the Thirty Tyrants was to rid the city of large numbers of professional sycophants—a measure which received the unqualified approval of all decent and law-abiding citizens.

The sycophant preferred no doubt to institute prosecutions that yielded an immediate financial return such as "denunciation" and "inventory" and the like, for they enabled him also to adopt his favorite pose of public benefactor whose services brought money to the public treasury. But he was far from confining himself to such suits. Success in any suit made him a more formidable antagonist in the eyes of his victims and enabled him to blackmail them more easily. For it is plain that the hush money exacted from accused persons constituted the mainstay of the large number of sycophants that infested Athens. The successful sycophant posing as a public champion and skilled in all the tricks and turns of litigation was indeed a terror to evildoers. Even the innocent shrank from the ordeal of a trial before a jury always susceptible to appeals to their passions and their prejudices. It is not strange that many timid persons preferred to pay a comparatively small sum of money rather than run the risk of a trial.

A client of Isocrates discloses the method employed by Callimachus, the plaintiff, in an attempt to extort money from him. Callimachus took every opportunity in public of dwelling on the alleged wrongs done him. In due time some of Callimachus' intimates approached the

defendant and advised him to free himself from the accusation and the danger of losing a large sum of money even if he was confident in the strength of his case. "For many things turn out contrary to expectation in a court. Luck, rather than justice, determines the issue. It is much wiser to pay a small sum and be free from trouble." He admits that in the end he agreed to pay two hundred drachmas. This case throws some light on another aspect of blackmail. Blackmail, as we understand it, is an ugly business; its limit is commonly the capacity of the victim to pay. But in Athens the threat of litigation was quite different from the threats used by modern blackmailers which frequently contemplate the disgrace and ruin of the victim. If blackmail on a large scale was to succeed the men who paid hush money must have some reasonable assurance that the payment of a stipulated sum would protect them from further demands. Otherwise an accused person would prefer the risk of paying a fine or damages once to continual bleeding at the hands of a professional accuser. Naturally, arrangements of this sort were not often made public. It was to the interest of both parties not to disclose them. The defendant in the present case, however, did disclose in court the plan he adopted to secure himself from further demands. He entered into an agreement with Callimachus to submit the matter to a conditional arbitration. The arbitrator was to decide that the matter be settled by the payment of a sum previously agreed upon by the parties. In case of a further attempt to press the charge the arbitration could be pleaded in bar of action. As it happened, Callimachus disregarded the arbitration

and brought suit. The defendant resorted to a demurrer and explained the whole transaction to the jury. Otherwise we should never have heard of it. This plan was suitable for civil cases but not for criminal charges. However, the case shows that sycophants did make arrangements to reassure their victims even if they could not always be trusted. But how about other sycophants? Had Socrates made his escape from prison as his friend Crito urged him to do all the professional accusers would have been in a position to extort money from the close friends of Socrates who would certainly have been suspected of aiding and abetting in the escape. And yet Crito's assurance to Socrates on this point seems to indicate that all danger could be avoided by the payment of a comparatively small sum to the sycophants. It is just possible that such matters were managed through the clubs or gangs of professional sycophants that flourished in Athens, though there is no mention of this phase of their activities in literature.

Naturally the false accusations made by sycophants and the evils that flow from them are most reprehensible in the estimation of the defendants who inveigh against them in court and the comedians who pillory them on the stage. But there is another effect of their activities which though rarely mentioned was nevertheless very detrimental to the proper administration of justice. Unquestionably one of the effects of extorting blackmail alike from innocent and guilty was that a considerable number of criminals escaped punishment through the agency of the sycophants they bribed.

The Athenians had some general regulations in-

tended to discourage any kind of vexatious and unwarranted prosecutions as well as special laws against sycophants. A prosecutor who dropped a public suit after it was started was liable to be fined one thousand drachmas and to be deprived of the right to bring a similar suit in the future. There are references to convictions under this law, but one gets the impression that it was more honored in the breach than in the observance. This was to be expected, since the enforcement of this as well as other laws was left to volunteer accusers. The magistrate was not required to take action against a prosecutor in default. Other sycophants were not likely to enforce a law against one of their own profession particularly when the same law might be invoked against themselves if anyone cared to investigate their records. In any event the law could be evaded with impunity by a mutual arrangement between the parties for a continuance when the case was called for trial, with the understanding that it would not be resumed. A more effective deterrent to sycophancy was the law that rendered plaintiffs in criminal suits liable to a fine of one thousand drachmas and deprivation of the right to bring a similar suit in the future if they failed to obtain at least a fifth of the votes of the dicasts. For in this instance the enforcement of the law did not depend entirely upon disinterested voluntary prosecutors; the successful defendant could be depended upon to see that his accuser was punished. The law applied to certain civil suits also. Here the penalty for failure to obtain one-fifth of the votes was one-sixth of the damages claimed in the suit (ἐπωβελία).

Special proceedings against sycophants were provided. According to Isocrates, sycophants could be presented to the Ecclesia, impeached before the senate, or indicted before the Thesmothetae. It is not easy to see how a general charge of sycophancy could be formulated or proved. No extant speeches are concerned with the trial of a sycophant. But there are indications that sycophants could be arraigned under the law that rendered a man liable to punishment who deceived the people in senate, Ecclesia, or dicastery. This law would not reach blackmailers whose activities were even more harmful and reprehensible than those of the sycophant who carried a case to its conclusion. Blackmail, unless accompanied by violence, was not an offense in the eyes of the law. But, in any event, only the most flagrant cases could be dealt with by legal process. For it would have been prejudicial to public interest to put any check upon honest volunteer accusers even if they were inclined to be overzealous. Freedom of accusation was, as Aristotle pointed out, one of the cornerstones of democracy in Athens. Just as the freedom of the press in modern communities, it had to be jealously guarded in spite of certain obvious shortcomings and serious abuses. This explains why no one ever suggests the repeal or modification of this law of Solon. As Plutarch puts it: "A democracy without sycophancy is like a lark without a crest."

Of all the prosecutors mentioned in the records of Athenian litigation none is more public spirited and patriotic than Lycurgus. A member of an illustrious family that inherited a priesthood, he exhibited in his life sin-

cere piety, deep religious feeling, and ardent patriotism. He conceived it to be his sacred duty to prosecute especially those who had failed in their obligations to the state. Puritanical, austere, and severe to a fault, he pushed the prosecutions he undertook so relentlessly and dispassionately that it was said of him that he "wrote his indictments in death not in ink." This is a variation of the famous epigram of Demades, a contemporary orator, who said that "Draco wrote his laws in blood not in ink." Lycurgus wrote no speeches for others. The fifteen speeches attributed to him were all delivered by himself chiefly in public prosecutions. Only one has survived—an impeachment of Leocrates for desertion after the battle of Chaeronea in 338 B.C. Unlike most accusers he boldly proclaimed that he impeached Leocrates not because of personal enmity, but from a sense of duty. He promised to be absolutely fair, neither resorting to falsehood nor introducing irrelevant matters. If he does not prove that the defendant is a traitor he asks that he be acquitted. He may have erred on the side of severity, but he had the courage of his convictions and no one ever ventured to question his sincerity. Somewhere between these two extremes—the self-seeking sycophant and the overzealous patriotic prosecutor like Lycurgus—there must have been at all times a number of public-spirited citizens who served the state by bringing wrongdoers to justice as a matter of duty without harshness and without ulterior motives. The fact that Plato in the *Laws* has nothing better than volunteer accusers to suggest would seem to indicate that the system was reasonably satisfactory.

CHAPTER V

THE CHARACTER OF ATHENIAN COURTS

Athenian dicasts were neither judges nor jurors in the modern sense, and yet they performed the functions of both. They were merely a cross-section of the Athenian populace selected by lot from among those who presented themselves for service without any test of their fitness for the task of administering justice. A minimum age of thirty years, full rights of citizenship, and freedom from indebtedness to the state were the sole prerequisites.

In the English system, and generally in the American system, the duty of the jury is to ascertain the truth of matters in dispute, of the judge to decide questions of law. As the legal maxim puts it: *Ad quaestionem juris non respondent juratores; ad quaestionem facti non respondent judices.* Not only does the judge instruct the jury as to the law applicable to the case, but he decides what evidence is admissible, what questions may be put to the witnesses, and exercises the necessary compulsion if witnesses or others in court prove recalcitrant. In Athens all these functions were performed by the dicasts in so far as they were performed. The presiding magistrate differed in no wise from the chairman of a public meeting. The relative importance of dicasts and magistrates is shown by the fact that speakers always address the dicasts, never the magistrate. In many respects a

trial was like a public debate with the audience acting as judges. There were, to be sure, some restrictions and requirements that are characteristic of a law court. Chief among these was the oath administered annually to all the dicasts. The exact wording of the oath is not found in the sources, but the following reconstruction may be accepted as substantially correct:

> I will judge according to the laws and the decrees of the Athenian people and the senate of the Five Hundred. If there are no laws applicable to the case I will decide according to the best of my judgment without fear or animosity. I will judge strictly on the matter at issue. I will listen to both sides impartially.

The oath was intended to insure an impartial verdict based upon facts relevant to the issue and in accordance with law or equity. There were also rules regarding competency of witnesses and admissibility of evidence. A litigant could not be a witness in his own behalf; nor could women, children, and slaves testify in court. Hearsay evidence was barred; and speeches and evidence were expected to be relevant to the issue. But owing to the small number of these restrictions and the difficulty of enforcing them, the heliastic courts were in practice political rather than judicial bodies. According to Aristotle, the control of the judiciary gave the people control of the state. The courts did not merely try routine civil and criminal cases; they had the power to control magistrates and politicians surely and effectively. The eligibility of magistrates for office in case of doubt was determined by the heliastic courts; and all magistrates and officials, civil and military, were liable to be haled into court as the result of official irregularities disclosed

at the annual audit to which all were obliged to submit. By means of the so-called γραφὴ παρανόμων, an indictment for unconstitutional legislation, the process of legislation was supervised. This indictment could be brought against anyone who was responsible for an inexpedient or unconstitutional law. It was a favorite weapon of party warfare. Impeachment also afforded the people a means of direct action which enabled them to deal swiftly and effectively with crimes that were dangerous to the safety of the state. The marked growth in the power of the popular courts in the fifth century is largely due to the feeling of the masses that in them they had an effective instrument for controlling the state and safeguarding the democratic constitution.

The restriction of the jurisdiction of the Areopagus in 462 B.C. and the limitation of the punitive powers of the Senate of Five Hundred to the imposition of a fine of five hundred drachmas threw more power into the hands of the heliastic courts and definitely established their supremacy in the state. At the same time the institution of pay for jury service enabled the masses to continue to participate in the enlarged activities of the dicasteries.

The key to the popular control of the judiciary was the principle that each panel, being a plenipotentiary committee of the sovereign people, was supreme and independent in its sphere; its authority could not be shared with a chairman or judge or curtailed by any other court. It follows that no body of case law in equity or authoritative interpretations of statute law or binding precedents could be developed as in the English and

American systems. Each court must be entirely free to determine the facts and interpret and apply the law as it pleased. Binding precedents would have put intolerable restrictions upon this freedom by necessitating the development of a group of experts like modern judges to instruct the jury in the law applicable to the matter at issue, fairly and impartially it may be, but authoritatively nevertheless. Precedents also mean appellate courts made up of expert jurists whose judgments may reverse the verdict of a jury. In Athens there were no learned judges to dictate or expert counsel to advise. Chairmen, dicasts, and litigants were all plain people. If a litigant did display an unusual acquaintance with the law he was careful to explain that the necessities of the situation obliged him to familiarize himself with legal matters. Apart from such facts and opinions as a dicast could communicate to his more immediate neighbors during the trial there was no discussion of a case. Each dicast reached a conclusion on the matter at issue and registered his vote in secret. Like the vote of an audience at a public debate or a political meeting, the verdict was, as has been well said, a mere "affirmation or negation." It was obviously impossible to formulate the grounds upon which such a decision was based.

There was no appeal from the verdict. Upon proof of perjury a new trial was granted, but otherwise it was final. Neither were the dicasts held to account at the end of their year of office. To whom could they have rendered an account? This irresponsibility differentiates them fundamentally from all other citizens performing official duties, and emphasizes their equality with the

ecclesiasts. But the method of their selection insured their being a fairly representative body reflecting the prevailing opinions and sentiments of the masses and responsive to public opinion in spite of their legal irresponsibility. The sense of personal responsibility which tends to diminish in large bodies was emphasized by the dicastic oath and was frequently invoked by litigants. Lycurgus exclaimed:

> Remember that though each of you votes in secret, he cannot conceal his intention from the gods. You will presently go forth from the court, and all who have stood around, foreigners as well as citizens, will take a view of you, and will look at every man who passes by, one by one, and know by their countenances those who have given votes of acquittal.

But when strong passions and prejudices were aroused such appeals must have fallen upon deaf ears.

Dicasts were recruited by the voluntary system. If too many offered for service the lot was used; if too few, the draft could be employed. But it would appear that there were always plenty of volunteers. As there was no rotation as in the case of senators, magistrates, and other officials, the same person might serve year after year and so acquire useful experience. The attitude of the Aristophanic juryman is distinctly professional. In the *Wasps* of Aristophanes performed in 423 B.C. the jurors are represented as old men. And Isocrates bears evidence to their poverty in the fourth century. Perhaps both are exaggerating to some extent, and yet it is precisely the old and the poor who might be expected to be attracted by the service and the pay.

It was inevitable that in a numerous volunteer jury

there should be many who had personal knowledge of the facts in the case. It might even happen that a man went into the jury with his mind fully made up before he had heard the evidence. There are in the orators numerous appeals to the personal knowledge of the jurors. They are virtually witnesses. A speaker could have no better corroborative witnesses than the men who sat on the jury. The modern English and American practice of selecting a jury of men unacquainted with the facts or at least free from prejudice is a comparatively recent development. In the early history of the English jury its efficiency depended upon its knowledge, for the jurors were summoned by the judge for the purpose of answering certain definite questions of fact. And well on in the eighteenth century juries are still found deciding cases on the basis of their own knowledge. Knowledge of the matter in dispute was thus a prime requisite in a juryman. Hence it is that the modern jury is concerned only with the facts in the case.

The dicasts freely exercised their right to question speakers and to express approval and disapproval in noisy fashion without let or hindrance from the chairman. The frequent requests for silence in the Platonic defense of Socrates were no doubt entirely justified. "Demosthenes vows," says Aeschines on one occasion, "that his invective will call forth such tumultuous clamors from the jurors that I shall not venture to make my defense before them." Apparently this was no idle threat, for Apollodorus, a notorious litigant, once complained that owing to the clamors of the dicasts he was unable to utter a single word and lost his case. And Plato com-

pares the hooting and hand-clapping in court to the behavior of a theater audience. (2nd p. 88)

Personalities of all kinds were tolerated almost without protest. A man's whole life, private as well as public, was open to review. His public acts, his moral character, and his personal habits and idiosyncrasies were freely discussed in the hope of arousing some resentment among the dicasts. Character evidence permitted in modern practice only in criminal cases and then usually in favor of the accused was introduced by both sides in both civil and criminal suits. Even relatives and friends were attacked. It was quite usual for a litigant to call attention to his own public spirit and his liberality in performing state services, while charging his opponent with concealing his property and evading public services.

The dicasts brought into court their fears, their prejudices, and their animosities, both social and political, to which speakers did not scruple to appeal. They were especially susceptible to appeals to their democratic prejudices. Litigants constantly represent themselves and their ancestors as good democrats; their opponents and their forebears are represented as anti-democratic and oligarchic in sympathies and conduct. The dicasts are warned that democratic institutions are in danger, that the defendant is trying to put himself above the laws and is insulting the constitution and the courts.

It was so customary for defendants to introduce their children and their female relatives into court to move the jurors to pity by their tears that Socrates

deemed it necessary to apologize for not staging one of these "tearful spectacles."

> Perhaps there may be some one who is offended with me as he calls to mind how he himself on a similar or even less serious occasion had recourse to prayers and supplications with many tears, and how he produced his children in court together with a posse of friends and relatives; whereas I who am probably in danger of my life will do none of these things. Perhaps this may come into his mind and he may vote in anger because he is displeased. I say these things ought not to be done; if they are done you ought not to permit them.

The system of drafting dicasts for the different panels in the fourth century was so elaborate and intricate that bribing of individual dicasts must have been a difficult and expensive undertaking. But in spite of all precautions there were some attempts at bribery. Apparently the only feasible plan was to distribute money rather generally among the whole body of dicasts in the hope that a sufficient number of corrupt dicasts would be assigned to a particular panel to influence the verdict. But this proceeding was possible only for the rich. Anytus, one of the prosecutors of Socrates, is reputed to have been the first who successfully bribed a jury. This happened in 409 B.C. when he was tried for treason as the result of an unsuccessful attempt to recapture Pylos. A few other jury-bribers are mentioned in the next century, but the very notoriety of Anytus' exploit would seem to indicate that jury-bribing was as uncommon in Athens as it is in America.

The defects of the Athenian dicastic system so manifest to modern students did not altogether escape the observation of the Athenians themselves. But naturally a

litigant was slow to criticize in their presence the men who held his fate and fortune in their hands. Occasionally mild protests were offered. "Neither should a man's good deeds save him from conviction if guilty, nor his evil deeds, apart from the charge in the indictment, convict him if innocent," says a client of Antiphon. And Andocides points out rather skilfully the implications of dicastic irresponsibility. Contrasting the deliberations of the Senate of Five Hundred with those of the jury he remarks: "They are less likely than you to make a mistake, for they deliberate at leisure and are liable to be blamed and held in ill repute by the rest of the citizens. But there is no one to find fault with you. For it is your right to dispose of matters that come before you well or ill as you please." But few speakers had the hardihood to criticize like the fearless Socrates who is represented in the Platonic *Apology* as protesting vigorously against the practice of allowing popular prejudice to influence verdicts. "My conviction," he observes, "if I am convicted, will be due not to my accusers, but to longstanding calumnies and prejudices. These have convicted many a good man, and it is not likely that my case will prove an exception." Litigants were more likely to flatter than to criticize. The dicasts are called "guardians of the law and the constitution"; their fairness and justice are extolled. It is rarely, if ever, hinted that they may render an unjust verdict. But warnings against being deceived by unscrupulous opponents are common. For in forensic theory juries could do no wrong. Their wicked advisers were responsible for all miscarriages of justice. Consequently it is well to accept with caution

indiscriminate praise bestowed upon a jury by interested parties. A client of Hyperides, however, cites several specific instances in which juries not only acquitted men whom they thought wrongfully accused but even punished the prosecutors. These cases are so circumstantial that they deserve some credence. They indicate that Athenian juries could and did mete out substantial justice.

You, Polyeuctus, and those who are of your opinion seem to me to fail entirely to recognize the fact that no democracy in the world, no monarch, no nation is more magnanimous than the people of Athens; they allow no individual citizen or group of citizens to be persecuted in the courts but afford them protection. Teisis of Agraulae first listed as public property the estate of Euthycrates which amounted to more than sixty talents. Next he promised that he would enter suit to sequester the property of Philipp and Nausicles alleging that their wealth came from unpaid mining royalties. But the dicasts were so far from heeding any such language or coveting the property of others that the man who attempted to play the sycophant failed to receive a fifth part of the votes and was in consequence fined and disfranchised. And is not this action of a jury only last month deserving of great praise, may I ask? Lysander charged Epicrates of Pallene who had worked a mine for three years, with encroaching on public property. With him were associated about the wealthiest men in the city. Lysander promised to recover for the state three hundred talents which he claimed these men had realized by their operations. Nevertheless the jury, having regard not to the promises of the prosecutor but to justice, decided that there was no encroachment.

Outside the courtroom men were more outspoken than the cautious litigant. On the eve of Socrates' trial when a friend remonstrated with him for not making adequate preparations for his defense he replied that he

had been preparing all his life for his defense by doing no wrong. "But do you not see," inquired his friend, "that the Athenian dicasts frequently become angry and put innocent men to death and frequently acquit those guilty of wrong, moved to pity by their eloquent speeches?" Isocrates also in the *Antidosis,* a defense of his educational and philosophical ideas written in the form of a forensic speech, represents a friend as trying to dissuade him from reciting his public services in court. "Some jurors are so savage and so hostile that because of their envy and their poverty they are enemies not of wickedness but of success, and hate not only the most moderate citizens but the most righteous conduct. This is bad enough. But they even side with wrongdoers on trial and acquit them, while they put to death those whom they envy if they can."[1]

Some critics found fault with the practice of paying dicasts which was introduced by Pericles in the latter half of the fifth century. Aristotle says:

> Pericles was the first to institute pay for service in the law-courts, as a bid for popular favor to counterbalance the wealth of Cimon. . . . . Some persons accuse him of thereby causing a deterioration in the character of the juries, since it was always the inferior people who were anxious to submit themselves for selection as jurors, rather than the men of better position.

It has been suggested that Aristotle may have had in mind the animadversions of Plato who in the *Gorgias* represents Socrates as saying: "I should like to know

[1] Lofberg, *Sycophancy in Athens,* p. 16. It would be tedious to specify in detail my great indebtedness to this excellent book in this and the two succeeding chapters. I discharge my obligations by this general acknowledgment.

whether the Athenians are said to have been made better by Pericles, or, on the contrary, to have been corrupted by him; for I hear that he was the first who gave the people pay, and made them idle and cowardly and encouraged them in the love of talk and of money." The rejoinder of Callicles that Socrates must have heard that from the philo-Spartan set shows that this was the view of the conservatives who, if not openly anti-democratic, were at least strongly opposed to the extreme type of democracy developed in Athens. They were never weary of praising Sparta and the Spartan system. Some of them even affected the rough, simple Spartan dress and devoted themselves to boxing—a sport which did not appeal to the Athenians.

Politicians have always been ready to exploit any group of citizens subsidized by the state. The dicasts of Athens were no exception. Isocrates exclaims:

> Who of the friends of democracy is not pained to see the numbers of citizens standing around the courts hoping to be drawn for service in order to secure the means of subsistence? I am surprised that you are unable to realize that no class is more ill disposed to democracy than the vicious politicians and demagogues. Seeing a portion of the citizen body, owing to their poverty and dependence upon the income from attendance at courts and assemblies, obliged to be at their beck and call they rejoice at the increase of impeachments, indictments and other vexatious litigation which they encourage.

This alliance between dicasts and demagogues is the subject of Aristophanes' comedy, the *Wasps,* presented in 423 B.C. Cleon, who was responsible for a substantial increase in the pay of the dicasts, is the demagogue Aristophanes has in mind. The play opens with two slaves

on guard before a house in which Philocleon, an old dicast who delights to spend his days in jury service, has been interned by his son Anticleon in an effort to cure him of the habit. The names at once suggest that the purpose of the play is to attack Cleon and not the jury system. One of the slaves explains the situation to the audience. "He is fond of jury service, no man like him. . . . . He loves it, and he weeps if he can't get a front seat. . . . . Supper scarce done he clamors for his shoes, hurries to the court and sleeps stuck to the doorpost like a limpet." After a number of vain attempts to escape the vigilance of the slaves the old man appears on the roof and inquires:

> What are you villains up to? Won't you let me out to sit in judgment? Shall Dracontides escape unpunished?
>
> Well, why should you worry?
>
> Why once when I consulted the Delphian oracle, he said that I should wither up if ever I allowed a defendant to escape.

When all his schemes fail the slaves on guard hope for a little sleep just at daybreak. But they are disappointed, for the companions of the old dicast appear as the chorus, rigged out like wasps, and sing a song to wake Philocleon. When he fails to appear in answer to their song the leader suggests that he must be sick in bed because a rascal escaped them yesterday by falsely claiming that he was a friend of Athens and that he had been the first to report the revolt of Samos—an event that occurred nearly twenty years before. Next he announces that Laches, who is reputed to have a hive of money, is to be tried and that their patron Cleon has notified his trusty dicasts to appear for service with three days' store

of anger. This is a parody on the mobilization order to appear for service with three days' rations. A struggle between Anticleon and his slaves, and Philocleon and the dicasts ensues. Finally, a truce is arranged and the dispute between the father and son is submitted to the dicasts as arbitrators. Then follows the familiar debate of comedy.

Philocleon praises extravagantly the joys of the dicast's life.

The dicast leads a jolly life, who happier is than he?
Though old in age he knows delight, and fares right daintily;
When rising early in the morn to court he takes his way,
The great and powerful at the door for him obsequious stay.
Then some delinquent softly puts his oily palm in mine,
And conscious of his frauds begins with doleful voice to whine—
"Have pity, if, when you yourself in office were, old fellow,
Perchance you happened to commit some trifling peccadillo";
And yet he never would have known of my existence here,
Had I not tried the rogue before and—let him off, I fear.
But when I take my seat in court, with coaxing flattery plied,
Straightway the promises I break which I have made outside.[2]

. . . . . .

And what if a father by will to a friend his daughter and heiress bequeath and bestow,
We care not a rap for the will, or the cap which is there on the seal so grand and sedate,
We bid them begone, and be hanged, and ourselves take charge of the girl and her worthy estate;
And we give her away to whoever we choose, to whoever may chance to persuade us: yet we,
Whilst other officials must pass an account, alone from control and accounting are free.

. . . . . .

[2] Translated by Forsythe, *op. cit.*, p. 33.

Is this not a fine dominion of mine?
Is it less than the empire of Zeus?

In reply Anticleon estimates that the total revenues of the state amount to over two thousand talents, while the pay of the six thousand dicasts for a year is one hundred and fifty talents, a mere pittance.

And just consider when you and all might revel in affluence, free as air,
How these same demagogues wheel you round, and cabin and coop you I know not where.

. . . . . .

They mean you all to be poor and gaunt, and I'll tell you, father, the reason why.
They want you to know your keeper's hand; and then if he hiss you on to fly
At some helpless foe, away you go, with eager vehemence ready and rough.

In the end Anticleon proves his point that the dicasts are the slaves of the self-seeking politicians, and wins the debate.

In the course of the comedy there are many jibes and jests at the expense of the dicasts. But it would be a mistake to take these seriously as some have done. The jurors, as depicted by Aristophanes, are indeed, as Grote observes, "monsters of caprice and injustice," and not the Marathonian heroes whom the poet delighted to honor, and with whom he identifies them in the course of the play. No free community would think of tolerating such a caricature of a judicial system. The fact that the play received a prize (the second) shows that the audience did not regard it as an attack on the democratic administration of justice. It is perhaps going

too far to agree with Rogers that the mind of Aristophanes was not in any measure alive to the manifold defects of the heliastic system. No thinking man could be entirely blind to them, though he might be puzzled to suggest adequate reforms consonant with the preservation of democratic institutions. Isocrates writing about the middle of the fourth century and advocating a return to the democracy of Solon and Cleisthenes, has this to say about the administration of justice:

> In those days in adjudicating suits for the recovery of money lent out they did not favor the debtors but obeyed the laws, being more indignant at those who tried to evade payment than the victims themselves, for they believed that the poor rather than the rich were injured when confidence in loans was destroyed.

The implication of these words is that fourth-century juries, in the words of Socrates, "handed out justice as a favor." "Multiplicity and complexity of laws are of no avail if the judges have not justice in their hearts." Isocrates' remedy is proper education and rigid supervision by the Areopagus involving very slight constitutional changes. A number of criticisms and suggestions are found in Plato. In the *Republic,* while refraining from constructing an ideal judicial system, he remarks: "Good citizens will themselves discover the necessary regulations regarding the business of the agora, about bargains and contracts with artisans, about insults and injuries, and the order in which cases are to be tried and how judges are to be appointed." He makes it quite clear that the judge must be an expert. "In this state and in this only shall a shoemaker be a shoemaker and not a

pilot also, and a farmer be a farmer and not a dicast also."

In the *Laws,* a more practical treatise than the *Republic,* Plato accepts the normal Greek view that

> every magistrate must also be a judge of some things. . . . . In the judgment of offenses against the state the people ought to participate, for when anyone wrongs the state they are all wronged, and may reasonably complain if they are not allowed to share in the decision. . . . . And in private suits, too, as far as possible, all should have a share; for he who has no share in the administration of justice, is apt to imagine that he has no share in the state at all. And for this reason there shall be a court of law in every ward, and the judges shall be chosen by lot. . . . . Where courts are noisy and disorderly, as in a theater, clapping or hooting in turn this or that orator the legislator should allow them to ordain the penalties only for the smallest offenses.

Without doubt he has in mind the noisy and disorderly Athenian tribunals. Socrates in the *Apology* suggests that in capital cases more time, even several days, be allotted to the trial. In his own case he found the time at his disposal quite inadequate for persuading the dicasts regarding certain vital matters. He also objects to the practice of introducing women and children into court to influence the jurors by their tearful countenances and dejected air. But these and similar reforms are mere palliatives. Real improvement was impossible so long as democracy was unwilling to delegate judicial powers to men fitted by training to exercise them.

Of the attitude of avowed opponents of democracy there is no doubt. "A bad man has a better chance of escaping punishment in a democracy than in an oligar-

chy," says Pseudo-Xenophon.[3] "In their courts the Athenians are more concerned with what is to their advantage than what is just." He has much to say about the congestion of the courts. Some relief might be afforded by providing smaller panels and more of them. But this reform is rejected because it would facilitate bribery.

> It is not possible for matters to stand on any very different footing from the present, except to some slight extent by adding here or deducting there. . . . . Any large modification is out of the question, short of damaging the democracy itself. No doubt many expedients might be discovered for improving the constitution, but if the problem is to discover some adequate means of improving the constitution while at the same time the democracy is to remain intact, I say it is not easy to do except as I have just stated to the extent of some trifling addition here or deduction there.

The significant feature of this statement is the conviction of the critic that the democratic administration of justice cannot be improved in any satisfactory way; democracy itself should be abolished. With frank cynicism he admits the right of democracy to consult the interests of its adherents. He would as readily maintain the right of oligarchy to administer justice in the interest of the upper classes.

Judged by modern standards the Athenian judicial system fully deserves the strictures of Rogers. He says:

> I must record my opinion as an English lawyer, that it would be difficult to devise a judicial system less adapted to the due administration of justice. A large assembly can rarely if ever form a

[3] A political pamphlet dealing with the Athenian constitution in a critical and cynical spirit, wrongly attributed to Xenophon. It is commonly cited as the work of Pseudo-Xenophon. Translated by Dakyns.

fit tribunal for ascertaining facts or deciding questions of law. Its members lose their sense of individual responsibility to a great extent, and it is apt to degenerate into a mere mob, open to all the influences and liable to be swayed by all the passions which stir and agitate popular meetings.[4]

But Athenian judicial institutions should not be judged by modern standards. For as Grote reminds us: "The distinction between powers administrative and judicial, so highly valued among the more elaborate governments of modern Europe, since the political speculations of the last century, was in the early history of Athens almost unknown."[5] Grote proceeds to point out that the dicasteries were in all probability much more satisfactory than individual judges would have been.

To make the rich and powerful effectively amenable to justice has indeed been found so difficult everywhere, until a recent period of history, that we should be surprised if it were otherwise in Greece. . . . . Now the dikasteries were inaccessible both to corruption and to intimidation: their number, their secret suffrage, and the impossibility of knowing beforehand what individuals would sit on any particular case prevented both the one and the other. And besides that the magnitude of their number, extravagant according to our ideas of judicial business, was essential to this tutelary effect—it served farther to render the trial solemn and the verdict imposing on the minds of parties and spectators, as we may see from the fact that in important causes the dikastery was doubled or tripled. Nor was it possible by any other means than numbers to give dignity to an assembly of citizens of whom many were poor, some old, and all were despised individually by rich accused brought before them. . . . . These numerous dikasteries afforded the only organ which Grecian politics could devise

[4] Introduction to the *Wasps* of Aristophanes.

[5] *History of Greece,* V, 237 ff.

for getting redress against powerful criminals, public as well as private, and for obtaining a sincere and uncorrupt verdict.

This is an entirely reasonable point of view. But in his enthusiasm for democratic institutions Grote goes too far when he makes a favorable comparison between Athenian dicasteries and English juries. It is just as unreasonable to approve wholly of the Athenian jury system because it has some features in common with the English system as it would be to condemn unreservedly the American system because it reproduces in a measure some of the worst features of the Athenian system.[6]

The Areopagus, which was chiefly concerned with homicide cases, was highly respected by all Athenians. "It is so far superior to other courts," says Lycurgus, "that even those who are convicted by it do not question its justice." Even Socrates takes occasion to pay it a compliment. In the *Memoirs of Socrates* Xenophon records a conversation between the younger Pericles and Socrates regarding the state of Athens. Pericles, who has just been elected general, is rather pessimistic and criticizes Athenian litigiousness and lack of respect for authority. Socrates, having in mind the fact that Areopagites were ex-magistrates who had been honorably discharged at the end of their year of office, inquires:

Is not the Areopagus composed of men who have been tested and approved?

Yes indeed, Socrates.

Do you know of any judges whose decisions are more excellent, more in accordance with law, more respected or more just?

[6] Lofberg, "Trial by Jury in Athens and America," *Classical Journal*, XVIII, 3 ff.

Pericles admits that he has no fault to find with the Areopagus. "It is the only court," says Demosthenes, "with whose jurisdiction in homicide cases neither tyrant nor oligarchy nor democracy has ventured to interfere." Apparently Plato had no fault to find with the Areopagus as a tribunal; for in the *Laws* he proposes the establishment of a court recruited in much the same fashion for the trial of capital cases. "In cases of death, let the judges be the guardians of the law and let a court be selected according to merit from last year's magistrates."

Miscarriages of justice are mainly due either to laxity or to severity. The former fault is more common and in the long run more serious. Public opinion is instantly aroused by irreparable wrong done to an innocent man, but it remains apathetic in the face of a lax administration of law which allows the escape of criminals whose guilt is beyond question. Both Isocrates and Pseudo-Xenophon, as we have seen, charge the Athenians with laxity. It should be remembered in this connection that there was no sovereign or president to grant pardons. In a modern state the courts may be guided solely by the law and the facts, confident that if there are any proper grounds for leniency they will be brought to the attention of the pardoning power. Indeed, a jury frequently adds a recommendation for mercy to a verdict of guilty. In Athens if there was need for mercy it must be granted by the court itself. Under these circumstances a verdict of acquittal may in effect be a pardon. This consideration affords some justification for appeals to the pity and compassion of the Athenian dicasts. Specific instances

of undue leniency are hard to find in the literature. This is only natural. The guilt of a criminal who is allowed to escape is never so easily proved and demonstrated as the innocence of one wrongfully convicted. Aristophanes, who is never weary of picturing the dicasts as harsh and severe, cites a case in the *Wasps* in which the defendant won an acquittal by claiming to have done a signal service to Athens twenty-five years ago by giving information of a revolt in one of the subject cities. Not a few flagrant instances of the miscarriage of justice due to passion and prejudice can be cited. The case of Socrates at once occurs as a notorious example of the failure of justice, due, as Plato claims, to slander and prejudice. But the martyrdom of Socrates stands alone. There were many philosophers and sophists in Athens who came and went without let or hindrance.

Athens had no court of appeal to review the findings of trial courts and reveal errors, but there was a law that held a prosecutor personally responsible if he deceived the people in assembly, senate, or dicastery. Naturally such a law could be invoked only in the most flagrant cases. Under it the prosecutors of the generals executed after the battle of Arginusae were punished.[7]

Penalties in fifth-century Athens were more severe than in modern communities. But they could easily be paralleled in England a little over a hundred years ago where the laws like those of Draco were often written in blood.[8] In some respects Athenian penalties seem ex-

[7] See Trial of the Generals, pp. 245 ff.

[8] "Over two hundred cases were capital at the beginning of the nineteenth century though many had fallen into desuetude". (*A Century of Law Reforms,* p. 46).

traordinarily lenient and ineffective. Banishment and disfranchisement, complete or partial, which are rare forms of punishment in modern times, were very common in Athens. In a way they take the place of imprisonment which was but little used in ancient times. It was easier to banish a criminal than to incarcerate him indefinitely at the public expense. In modern times banishment is not so severe a penalty as it was in the ancient world where the alien did not receive the consideration now accorded him. Similarly the criminal of today would laugh at the loss of the franchise as a punishment when an alarmingly small percentage of the citizens avail themselves of their political rights. Confiscation of property, so common in Athens as a form of punishment, has practically disappeared, because of the hardship it entails upon the dependents of the criminal. The greatest divergence of points of view is found in the matter of the death penalty which was inflicted very lightly in ancient times. But it is a question whether we have not gone too far in our regard for the sanctity of human life and our concern for the welfare of the criminal. In Athens the prevailing disregard for human life was exemplified in the laws of Draco which provided the death penalty for the most trifling offenses. But the rise of democracy brought a change. Owing to the severity of Draco's laws all except those dealing with homicide were repealed by Solon. The epigram of Demades to the effect that these famous laws were written in blood shows that later generations never forgot their harshness.

In spite of very marked differences in practice and procedure and the organization of the courts be-

tween the Athenian system and our own, criminals were brought to justice more surely in Athens than in America. In civil suits there seems no reason to doubt that the majority of litigants received substantial justice. "We render obedience," says Pericles in the funeral oration, "to those in authority and to the laws, especially to those which are ordained for the succor of the oppressed. . . . . In the eyes of the law all men are on an equality as regards the settlement of their private disputes."

CHAPTER VI

ATHENIAN LITIGIOUSNESS

The litigiousness of the Athenians was proverbial. Aristophanes is never weary of jesting about Athenian preoccupation with litigation. "You Athenians do nothing but try cases," says Trygaeus, the pacifist, in the *Peace*. In the *Clouds* when Athens was pointed out to Strepsiades on a map of Greece, something of a novelty in the fifth century, he exclaimed: "I don't believe it for I see no juries sitting." "Grasshoppers chirp upon their boughs a month or two," observes Euelpides in the *Birds,* "but our Athenians chirp over their lawsuits their whole life long." The enemies of imperial Athens were quick to seize upon the Athenian practice of requiring their subject allies to bring a considerable proportion of their suits to the city as evidence of Athenian fondness for litigation. The Athenian apologist before the Spartan assembly on the eve of the Peloponnesian War was at considerable pains to point out that this reputation was quite undeserved. But he is not convincing. It is commonly believed that the amount of litigation in Athens was excessive. Except during the celebration of festivals or the prosecution of serious military operations the courts were in almost constant session. A dicast, it would appear, could rely upon jury service to yield a modest but fairly regular income if one may call three obols[1] a day an income.

[1] About ten cents.

This situation was in large measure due to a variety of conditions without parallel in modern communities rather than to unusual quarrelsomeness or criminality on the part of the Athenians. Through the medium of the popular courts the people exercised a stringent control over their magistrates by means of (1) a scrutiny before they entered upon their office (δοκιμασία), (2) regular reviews of their official acts during tenure of office (ἐπιχειροτονία), (3) a strict audit on retiring from office (εὔθυνα). Each magistrate- or senator-elect was required to show that he was eligible for office. Eligibility depended upon citizen descent for three generations, possession of a family tomb, proper respect for parents, adherence to certain religious cults, and the due performance of military duties. At the time of the scrutiny an opportunity was given to any citizen to lodge a complaint against the magistrate-elect. If an accuser was forthcoming a regular trial was held and the candidate's whole career was subject to review, according to law. For in these cases the usual meager restrictions upon irrelevancy were relaxed. An unfavorable verdict excluded the accused from office. Ten times in the course of the year the magistrates were liable to be recalled if the assembly voted that they had not satisfactorily discharged the duties of their offices. Any citizen was entitled at this time to bring specific charges and press them in court if the assembly deemed them serious. Meanwhile, the magistrate was suspended from office. On retiring from office all officials were required to submit their records to a board of auditors. Any shortage in their accounts entailed an indictment and trial. Furthermore,

ample opportunity was given any citizen who had a grievance to prosecute an official for malfeasance in office. Naturally in many cases these various inquiries were more or less perfunctory, but the appearance of a professional accuser (sycophant) or a personal or political foe might at any time result in litigation. The wide latitude allowed the accusers in pressing their cases encouraged interested parties to bring ill-founded or even groundless charges. Owing to the system of rotation in office the personnel of the several hundred officials and senators changed annually. As a result a very large number of men who could not be included in the criminal class ran a risk, unknown in modern systems, of being involved in litigation.

The process of legislation in Athens involved the services of a group of dicasts. Once a year the assembly considered the advisability of accepting proposals for changes in the laws. If the vote was favorable all suggestions for changes together with the laws to be abrogated or amended were posted in the market place and filed with the clerk of the assembly who read them at the two succeeding meetings. The assembly then made provision for the selection by lot of a group of dicasts called "nomothetes," or legislative commissioners (*νομοθέται*). The number varied. Commissions of five hundred and of one thousand are mentioned. The proceedings were the same as in a regular court. It was the duty of the commissioners to listen to the proposer of the new law or amendment, to the five public advocates appointed to defend the law impugned, and to any other citizens who cared to speak on either side. The issue was decided by

a majority vote. During one year after the passage of a new law the mover was liable to indictment and punishment for unconstitutional legislation (γραφὴ παρανόμων). The unconstitutionality might consist either in the character of the legislation or in the failure to observe the procedure provided by law. The penalty was assessed by the jury and might be severe. After the expiration of a year the mover was free from personal liability, but the law could be attacked at any time. The process of legislation was a fruitful source of litigation. The indictment for unconstitutional legislation was the favorite political weapon of the fourth century. Litigation was the handmaid of politics. Aristophon, a prominent politician contemporary with Demosthenes, is said to have boasted that he was indicted seventy times for unconstitutional measures. In a modern state jealousies and animosities find expression in the regularly recurring elections. In Athens the real power was exercised by the professional politicians rather than by the magistrates elected by lot. These political trials afforded an excellent opportunity for the expression of popular confidence or distrust in a prominent politician. For the verdict of the jury which was really a committee of the assembly was almost as direct an expression of popular feeling as was a vote of the assembly itself.

It mattered not what the charge was. The jurors decided whether the accused still deserved the confidence of the people. The wide latitude allowed an accuser enabled him to review a politician's whole life both public and private. Such a trial offered an opportunity for all

the enemies of a public man to join in procuring his downfall.[2]

Wholesale prosecutions were resorted to in serious political struggles. Thus Ephialtes prepared for his attack on the political functions of the Areopagus in 462 B.C. by a series of prosecutions intended to discredit the more prominent Areopagites and in this way to weaken any opposition to the plans of the democratic leaders in their onslaught upon this last stronghold of political privilege and reaction. In 411 B.C. also the oligarchic plotters attempted to discredit democracy by more or less systematic prosecution of officials for peculation. Antiphon, the chief oligarchic leader and a prominent lawyer, acted as counsel for the prosecutors. Again in 404 B.C. the revolutionists effectually silenced popular opposition by securing the condemnation of their most effective leaders.[3] The enemies of Demosthenes used the courts freely in their efforts to destroy him politically. The following account of their machinations appears in one of his speeches:

> Afterwards when those who were bent on doing me mischief conspired and brought indictments, audits, impeachments, and the rest of it against me, not at first in their own persons, but in such names as they imagined would most effectually screen themselves (for you surely know and remember that every day of that first period I was arraigned, and that neither the desperation of Sosicles, nor the malignity of Philocrates, nor the madness of Diondas and Melantes, nor anything else was left untried by them against me), on all those occasions chiefly through the gods, secondly through you I was preserved. . . . . On the impeachments when

[2] Headlam, *Election by Lot,* pp. 35 ff.

[3] Calhoun, *Athenian Clubs in Politics and Litigation,* p. 105.

you acquitted me and did not give the prosecutors a fifth part of the votes you pronounced that my policy was best; by my acquittal on the indictments my motions and counsels were shown to be legal, by your passage of my accounts you acknowledged my whole conduct to have been honest and incorruptible.

The use of litigation as a political weapon is recognized by Plato in the *Republic* as entirely normal. The disorders that arise in democracy and end in tyranny lead first to "impeachments and judgments of one another. And the prospective tyrant acting as the protector of the people and having the mob at his disposal is not restrained from shedding the blood of kinsmen; by the favorite method of false accusation he brings them to court and murders them."

A peculiar feature of the Athenian system of taxation sometimes was responsible for a type of litigation quite unknown in modern times. The richer citizens were required to perform certain services for the state called "liturgies" that entailed considerable expense. The more important of these services were the trierarchy which involved the maintenance of a warship in commission for a definite period; the *choregia,* the training of a chorus for one of the recurring festivals; and the *gymnasiarchia,* the defraying of the expenses of the competitors in the torch races connected with some of the festivals. A system of rotation was followed in selecting the citizens to perform these services, but if anyone felt that he was wrongly called upon to undertake a liturgy he could select someone upon whom he thought the burden might more fairly fall and challenge him either to perform it or exchange property with the challenger and let

him perform it. If both proposals were rejected the matter was referred to a court to decide which should assume the burden. The legal process which was really an interpleader (διαδικασία) was called an *antidosis* (ἀντίδοσις). Demosthenes' guardians accepted an exchange of property in his behalf, but he intervened and performed the liturgy. The only litigation in which Isocrates was ever personally involved was an *antidosis* suit regarding a trierarchy which had been assigned to him to undertake. The case was decided against him.

A considerable amount of litigation originated in the overseas possessions of imperial Athens. Under her leadership the Greek cities of the islands and littoral of the Aegean Sea formed a league to insure their independence and freedom from Persian aggression after the victories of Salamis and Plataea. By the middle of the fifth century all but three of the 250 or more allied cities had lost their independence. The confederacy of Delos had become an Athenian empire. The judicial independence of the subordinate cities was very considerably curtailed. The heliastic courts offered the Athenian government a convenient means of exercising effective control over these far-flung communities. The chief source of danger to Athens lay in the intrigues of the oligarchic minorities which were opposed to Athenian imperialism. Pseudo-Xenophon, writing in 424 B.C. while the empire was still intact, says, that the Athenians "sitting at home, without dispatching ships, have the cities of the allies under their control. They uphold the friends of democracy in the courts and destroy those opposed to it, whereas if the several communities had justice administered in their

own cities, in their hostility to Athens they would destroy those of their countrymen who were most attached to the popular party at Athens." For these reasons all cases in the subordinate cities involving the penalties of death, banishment, or disfranchisement were referred to Athenian courts. In civil suits, also, local jurisdiction was restricted to the less important cases.[4]

It is impossible to estimate even approximately the proportion of Athenian litigation which originated in the subordinate cities. Pseudo-Xenophon in enumerating the various advantages accruing to Athens from the system observes that the increased court fees enabled the Athenians to draw pay for jury service throughout the year. Similarly, he notes the subsidiary advantages in the way of harbor dues, rent for houses, slaves, and vehicles, and the fees of criers and heralds paid by members of the subject states sojourning in Athens. In spite of exaggeration due to the pronounced oligarchic sympathies of the writer this state of affairs would seem to indicate that the volume of overseas litigation was very large. This conclusion is amply confirmed by Isocrates' indictment of this feature of Athenian imperialism. "By outraging the allies, and falsely accusing them and depriving the best of them of their property, the sycophants succeeded in putting them in such a frame of mind that they revolted from us gladly, and accepted the friendship and alliance offered by the Lacedaemonians." If this statement is at all near the truth one need not be surprised to learn from Thucydides that the widespread reputation of the Athenians for litigiousness was due

[4] Robertson, *Administration of Justice in the Athenian Empire.*

largely to the judicial control which Athens exercised over her allies.

Compared with modern statutes Athenian laws were not well drafted. Many words and phrases were doubtful in meaning and difficult of application. In the British and American systems the scope and meaning of a law is eventually defined authoritatively by judicial decisions. But in Athens the decisions of one court did not bind another. Each jury interpreted and applied the law as it saw fit. This unusual feature of the Athenian judicial system was undoubtedly responsible for much litigation that is avoided in modern systems. Speaking of Solon's laws Aristotle remarks: "Since the laws were not drawn up in simple and explicit terms, but like the one concerning inheritances and wards, disputes inevitably occurred, and the courts had to decide in every case whether public or private." As a result there was a widespread belief that Solon purposely made the laws indefinite in order to increase the power of the popular courts which he regarded as one of the bulwarks of democracy. Aristotle himself, however, attributes the vagueness in the laws to the "difficulty of attaining perfection in framing a law in general terms." Among the earlier measures of the Thirty Tyrants was an attempt at law reform. They repealed such of Solon's laws as were obscure; others they revised. For example, they allowed a testator to leave his property as he pleased by abolishing the existing limitations in case of insanity, old age, or undue female influence in order that no opening might be left for the sycophants. Wills were a fruitful source of litigation. The vagaries of the juries and

the ease with which wills could be forged encouraged fraudulent claims. "If a man at his death," exclaims Philocleon, the old dicast in the *Wasps* of Aristophanes, "bequeaths his daughter with a dowry we bid the will with its solemn seal caps go hang, and give the heiress to him who wins us over by his entreaties." Cases in the extant forensic speeches show that this was not an idle boast. The fifth oration of Isaeus deals with an estate of which a young man claimed one-third as a son adopted by will. The other relatives acquiesced. Twelve years later he produced another will which gave him the whole estate. The court upheld this will, and the relatives were forced to relinquish the shares alloted to them under the earlier will. After the lapse of nearly ten years the second will was successfully attacked in court and the estate was redistributed according to the terms of the first will. Extraordinary ingenuity was displayed in concocting plausible claims to estates. One of the orations of Isaeus contains a lively description of the assaults made upon the estate of one Nicostratus who had died abroad after a continuous absence of eleven years.

Who did not have his hair cropped in mourning when those two talents came from Ake? Who did not put on black in the hope of inheriting the money by his display of grief? What a crowd of relatives and sons by testamentary adoption appeared as claimants of the estate of Nicostratus! Demosthenes claimed to be his uncle; but when he was exposed by my clients he desisted. Telephus contended that Nicostratus had bequeathed to him his entire estate. And he also soon abandoned his claim. Ameiniades appeared before the archon with a son of the deceased under three years of age in spite of the fact that Nicostratus had not been in Athens for eleven years. Pyrrhus of Lamptrae said that Nicostratus had dedi-

cated his property to Athena and had appointed him trustee. And Ctesias of Besa, and Cranaus first said that they held a judgment against Nicostratus for a talent; but failing to substantiate their assertion they alleged that he was their freedman. These are the men who at once swooped down on the estate of Nicostratus. At that time Chariades had not yet appeared as claimant; but a little later he appeared, not only claiming the property for himself, but foisting in a son of his own mistress, in the hope either of inheriting the property or, failing that, of making the lad a citizen. But he, too, realizing that he would fail to prove the relationship, relinquished the contest on behalf of the boy and entered suit on his own behalf as legatee.

The Athenian law governing the devolution of estates contained a unique provision which must have been responsible for a very considerable amount of otherwise avoidable litigation. When a man died without issue all claimants were notified by public announcement to appear before the archon for adjudication of conflicting claims. The decision of a court presided over by the archon was final only in regard to the persons present and to the issues raised, subject to the right to a new trial on proof of perjury.

New claimants might appear at any time during the life of the successful claimant or for a period of five years after his death. During the same period unsuccessful claimants or their heirs might reopen the case by shifting the basis of their claim. For example, a claimant under a will might renew the contest as next of kin. The effect of this extraordinary statute of limitations which did not begin to run until five years after the death of the successful claimant is clearly shown in the litigation regarding the estate of Hagnias, one of the Buse-

lidae, a numerous and wealthy family. Our information is derived from a speech of Isaeus and from another attributed to Demosthenes. Thus a fortunate accident of survival enables us to view the proceedings from the standpoint of opposing litigants. It would be too tedious to follow the details of this litigation, instructive though they are as to the vagaries of the Athenian probate courts. Suffice it to say that it required five suits extending over a period of nearly twenty years to dispose finally of this one estate.

The requirement that claimants against one in possession must deposit a sum equal to one-tenth of the estimated value of the estate, the deposit to be forfeited to the state in case of failure to obtain one-fifth part of the votes, must have caused many covetous relatives to hesitate. But occasionally several claimants pooled their interests and assisted one of their number to claim the estate for himself with the understanding that he would share with the others. There are two cases on record in which suit was brought to recover under an agreement of this kind.

A great deal of litigation in modern systems is due to the ample provision for appeals in both civil and criminal cases. The Athenians escaped this prolific source of litigation by making any and every court final. But the provision for a new trial on proof of perjury on the part of one or more witnesses seems to have been responsible for a large amount of litigation. At any rate, perjury trials were much more frequent than in modern times. A peculiar feature of these trials was that the plaintiff regularly reargued the original case in the hope

of influencing the new jury against the witness on trial. But apart from perjury suits there was plenty of opportunity for fresh litigation in enforcing a verdict. In civil suits the successful plaintiff must himself take steps to satisfy the judgment without official aid. If after the expiration of the period fixed by the law the defendant had not satisfied the judgment the plaintiff was empowered to seize personal property or make formal entry on real estate. In case of resistance an action of ejectment was the remedy. Not infrequently personal encounters and actions for assault and battery resulted from attempts to realize on judgments. A defeated defendant would be much more likely to assault the plaintiff whom he regarded as his personal enemy than an officer of the law executing the judgment of a court.

The state carried out the sentences imposed in criminal cases. Here again there was a possibility of further litigation. A common method of punishment was to deprive convicted persons either wholly or partially of their political rights. For example, all public debtors were *ipso facto* disfranchised. In private suits delinquent debtors eventually became public debtors. Andocides mentions a few of these partial disabilities to show how varied they were. The list includes deprivation of the right to speak in the assembly, to be a senator, to bring a public suit, to enter the market place, to sail to the Hellespont. The number of persons laboring under these various disabilities was considerable, as may be inferred from the practice of granting them amnesty in times of great national danger. It must have been a formidable task to try to enforce all these restrictions. Un-

doubtedly the temptation to try to evade them was strong. Persons exercising forbidden rights were liable to summary arrest (ἀπαγωγή) and prosecution by any citizen. Here was indeed a fertile field for sycophants and personal enemies of disfranchised defendants.

The Solonian provision allowing any citizen to prosecute a public offender increased very materially the number of persons involved in litigation, for duties that could have been performed by a few officials were distributed among many citizens. Furthermore, the system was calculated to foster a litigious spirit in both prosecutor and defendant. A citizen acting as prosecutor by his own choice was more likely to arouse the resentment of a defendant and provoke retaliation than an official doing his duty without fear or favor. And so the prosecutor even if he was free from animosity in the beginning was not infrequently forced in self-defense to undertake further litigation. Under these circumstances litigation too often degenerated into a mere instrument for inflicting punishment on a personal enemy. At every turn one meets traces of these feuds. It is significant to find Antiphon, in a practice speech which presumably is typical, attributing a murder to a litigious feud.

Who is more likely to have made the attack than the man who had already endured much at the hands of the deceased and expected to suffer still more? Such a person is the defendant. He was an old time enemy of the deceased and had without success prosecuted him on many serious charges and being himself convicted on more serious charges had lost a considerable portion of his property. Quite recently he had been indicted for stealing two talents of sacred money. Being conscious of guilt, knowing the

ability of his antagonist, and smarting under the punishment he had undergone it was only natural that he should slay his enemy in self-defense.

That this hypothetical case was not overdrawn is clear from the speech of one of Lysias' clients on trial for the murder of his wife's paramour. He enumerates and rejects the various motives which might have induced him to commit the crime. "Neither had the deceased brought vexatious indictments against me, nor had he attempted to procure my exile from the city, nor was I engaged in civil litigation with him, nor was he aware of any wrong I had done on account of which I should wish to kill him for fear he might disclose it."

Litigation permeated the entire citizen body to a degree quite impossible in modern communities. The numerous active politicians, the annually changing body of public officials and senators numbering many hundreds, as well as all the wealthier citizens, were constantly exposed to attacks at the hands of personal and political foes and the professional accusers. These men naturally retaliated when an opportunity presented itself. Thus the litigious spirit was fostered, and the ordinary citizen tended more and more to become involved in litigation. As a result of their general participation in litigation, either as parties or as dicasts, the Athenians were extraordinarily familiar with legal processes. In fact, they were a nation of lawyers. Every reader of the comedies of Aristophanes must be struck by the constant references to the details of litigation which reveal very clearly the familiarity of the average Athenian with the process of the law. One play, the *Wasps,* is devoted

entirely to the criticism of the judicial system, and in others many of the jests are pointless without some knowledge of the law. A good illustration occurs in *The Parliament of Women*. The women of Athens by a ruse secure control of the city and introduce a travesty of communism including trial marriages. The first choice of mates under the new system lies with the homeliest members of either sex. A handsome young man hoping to evade the law pays court to a charming young woman; but he is waylaid by two old maids, each of whom claims to be the uglier and the older. In despair the young man proposes to resort to a variety of expedients to escape from his predicament. He first proposes to have a friend apply for a writ of habeas corpus. When this is rejected he suggests in succession that he will claim exemption on the ground of disability, or ask for a continuance of his case on the ground that he is a merchant and must be about his business during the season of navigation. Next he offers to furnish bail bonds and sureties for his appearance on a subsequent occasion. Finally, he claims that his case falls within the provisions of the decree of Canonus, one of the foundation stones of judicial security. The scene would have been quite impossible had the audience not been familiar enough with legal procedure to understand the misapplication of the various remedies proposed. To appreciate fully the significance of this scene one has only to imagine the attitude of a modern theater audience toward a scene in which the humor consisted in the misuse of recognizance, sureties, injunctions, the statute of frauds, and the Magna Charta.

With all these opportunities and occasions for litigation one is not surprised to learn that the courts were congested. It could not well be otherwise. Pseudo-Xenophon complains:

It not seldom happens that a man is unable to transact a piece of business with the senate or people even if he sit waiting a whole year. Now this happens at Athens for no other reason save that owing to the immense mass of affairs they are unable to work off all the business on hand and dismiss the applicants. And how in the world should they be able, considering that in the first place they have more festivals to celebrate than any other state throughout the length and breadth of Hellas? As a matter of fact they are twice as numerous as those of any other people. During these festivals, of course, the transaction of any sort of affair of the state is out of the question. In the next place, only consider the number of cases they have to decide, what with private suits and public causes and scrutinies of magistrates' accounts, more than the whole of the rest of mankind put together. Here are some of the cases they have to decide. Someone fails to fit out a ship: judgment must be given. Another puts up a building encroaching on public land: again judgment must be given. Or to take another class of cases, adjudication has to be made between the choregi for the Dionysia, the Thargelia, the Panathenaea year after year. Also as between the trierarchs, four hundred of whom are appointed each year, of these too, any who choose must have their cases decided year after year. But this is not all. There are various magistrates to examine and approve and decide between; there are orphans whose status must be examined. . . . . At intervals there are exemptions and abstentions from military service which call for adjudication, or in connection with some extraordinary misdemeanor, some case of outrage and violence of an exceptional character, or some charge of impiety. A whole string of others I simply omit.

CHAPTER VII

THE CAREER OF A LITIGIOUS ATHENIAN

To the fortunate circumstance that the published forensic orations of a litigious Athenian of the fourth century so closely resembled those of Demosthenes as to be included in the Demosthenic *corpus*[1] is due the preservation of a series of documents which make possible the reconstruction of the public life of a citizen named Apollodorus, son of the banker Pasion, a man who had achieved no distinction such as to warrant the transmission of a record of his activities. A young man of considerable forensic ability but dissolute habits, he spent the ample fortune inherited from his shrewd and industrious father in showy public services, ruinous litigation, and the gratification of expensive tastes. He was of very humble extraction. Pasion, his father, was the slave of Archestratus, the junior member of the banking firm of Antisthenes and Archestratus, and was employed as accountant in the bank. As a reward for industry and faithfulness he was set free, and acquired the status of resident alien. Finally, he was naturalized on account of his notable financial services to the state. Even in the fourth century when naturalization had become more

[1] For a discussion of Demosthenes' professional relations with Apollodorus see p. 222. Schaeffer, *Demosthenes und seine Zeit* (Excursus in the 1st ed.), believes that Apollodorus composed his own speeches. Lipsius (p. 737, n. 225), disagrees with this view; cf. Sandys and Paley, *Demosthenes' Select Private Orations,* II, xxxix.

common this was a great honor. Meanwhile, he had become the sole owner of a prosperous banking business with wide financial connections and well-established credit throughout the eastern Mediterranean.

It was only natural that in the course of business a banker should occasionally become involved in litigation. It so happens that one of the speeches of Isocrates, written for a client who sued Pasion to recover a deposit, has been preserved. Although the case in no way concerns the son Apollodorus it is worth reviewing because it exhibits some of the more unscrupulous devices employed in litigation.

The son of a trusted minister of Satyrus, Prince of Pontus, desired to see something of the world. After making inquiries he decided upon a visit to Athens. Combining business with pleasure he took two ships laden with grain and a sum of money. He was introduced to Pasion in a business way by Pythodorus, his general agent and representative, and deposited money in the bank. Subsequently, his father Sopaeus lost the favor of Satyrus and was arrested. Instructions were sent to the representatives of Satyrus in Athens to arrest the young man and seize his property. Faced with utter ruin he consulted Pasion in whose integrity and judgment he had come to trust. Acting on his advice he turned over to the agents of the prince his ready money and other personal property, and not only denied that he had any money on deposit but insisted that he was actually in debt. He went so far as to have his pretended creditors dun him in the presence of the emissaries of Satyrus. He evaded immediate arrest, and sought to

make good his escape by withdrawing his money from the bank and taking ship to Byzantium, a favorite resort for political refugees from the Pontus. But to his astonishment Pasion disclaimed all knowledge of the deposit and refused to pay. Deposits were not easily proved. The bank ledger and the evidence of the accountant constituted the only available evidence. Furthermore, there seemed little likelihood that the young man, proscribed as he was, would ever be in a position to sue the banker. But a speedy reversal of his father's fortunes and his reinstatement in the favor of the Prince made it possible for him to remain in Athens. Pasion, anticipating recourse to law, contrived by a not uncommon scheme to put him on the defensive. As the accountant of the bank was a slave, named Kittus, the only way in which the plaintiff could secure his testimony was to challenge Pasion to surrender him for examination under torture. Knowing that a refusal to accept the challenge would be construed as evidence of guilt, Pasion concealed the slave and accused the young man and his legal representative Menexenus of kidnapping him. The motive alleged for this act of violence was the desire to conceal a slave through whose connivance, Pasion claimed, they had been able to abstract six talents from his bank. As a result the young man was haled before a magistrate and obliged to furnish bail to the amount of six talents. But again the banker failed in his design. Menexenus succeeded in finding the slave and entered suit for damages against the banker for falsely charging him with the crime of kidnapping. Pasion met this threat by a suit to secure the freedom of Kittus on the

ground that he was a freeman, not a slave. In effect this proceeding is analogous to a writ of habeas corpus. He succeeded in securing the liberty of Kittus on a bond. In the end the banker agreed to pay the money in Pontus to avoid publicity. The agreement under seal of both parties was deposited with another. But when it was opened in the Pontus it proved to be not an agreement to pay but a release to Pasion of all claims. Nevertheless, the young man sued to recover the deposit, claiming that Pasion had bribed the depositee and substituted an entirely different document. Owing to the difficulty of proving handwriting and the ease of forging seals, the allegation may well be true.

The result of the suit is not known. The opinion held by some scholars that Pasion won is based upon the fact that the banker continued to merit confidence and that he was granted citizenship some time after the trial. It is urged that a verdict against him on such charges would have ruined him utterly. Others suggest that the fleecing of a wealthy foreigner would not be regarded as a serious matter. This view may be dismissed, for even if the cynical laughed when an ex-slave was caught trying to defraud a rich alien few would care to intrust their money to such an accomplished and versatile rascal. The plaintiff himself in recounting his earlier dealings with Pasion described him as one of those bankers who "had wide connections and had the management of large sums of money, and whose position as men of business had won them a general confidence." That the young man was not so innocent and inexperienced as he would have the jury believe is evident from the fact,

which he himself incidentally discloses, that on one occasion he narrowly escaped being put to death by the senate without trial for some violation of the embargo upon trading with the enemy. But whether the charges were true or false the fact that a court was asked to believe them shows that a resourceful and unscrupulous Athenian litigant had at his disposal a considerable variety of schemes for defrauding an opponent and defeating the ends of justice.

Overtaken by the infirmities of age Pasion retired from business. The bank and the shield manufactory were leased to his confidential clerk Phormio who, like his employer, had been a slave and had obtained his freedom as the reward of honest service. Shortly afterward Pasion died, leaving a widow, Archippe by name, and two sons: Apollodorus, twenty-four years of age; and Pasicles, ten years of age. The will provided that the widow should marry Phormio with a substantial dowry. Phormio continued to lease the bank until the younger son whose guardian he was became of age. On the termination of the lease Phormio started in the banking business for himself and achieved considerable success.

The litigation of Apollodorus falls into three classes: (1) suits to recover money owing the estate of his father, or to protect himself against claims upon the estate which he regarded as unwarranted; (2) litigation with his stepfather, Phormio, arising out of his lease of the bank and the shield manufactory and the disposal of his mother's property; (3) miscellaneous litigation.

Apollodorus was proud of his position as a naturalized citizen, and was extremely anxious to do his full

civic duty not only by undertaking expensive liturgies[2] but by bringing offenders to justice. "Who does not know how incessantly you have been engaged in litigation," remarked the defendant in *Apollodorus* v. *Phormio,* "not only in prosecuting private suits of no less importance than this, but in trumping up public charges and bringing people to trial?" "You must know," observed another of his adversaries to the jury, "that the plaintiff has brought action against many of our citizens and recovered large sums of money, inserting in his plaints, 'such a party has injured me by not paying me the money which he owed to my father at the time of his death'." And another opponent remarks: "He has collected many talents' worth of debts, some of which he gets paid voluntarily, and some he recovers by action." The total thus collected amounted to twenty talents. There is no available information regarding the amount of litigation involved in these collections. One of his debtors was the distinguished general Timotheus whose dealings with the banker Pasion are set forth in *Apollodorus* v. *Timotheus*. The speech of the plaintiff has been preserved. The case is worth reviewing for the light it sheds on the banking business. In the year 374 B.C. when Timotheus was appointed to the command of the fleet to harass the Spartans and to force their withdrawal from Boeotia he asked Pasion for a loan to be delivered to his treasurer Antimachus. According to the allegations of Apollodorus, the money was actually delivered to the secretary of Antimachus at the bank and the

[2] State services such as training a chorus for the public festivals and keeping a warship in commission; cf. p. 101.

amount duly entered in the books against Timotheus. The next year he was deposed from his command for financial irregularities. His accusers were men of weight and influence, and he narrowly escaped the death penalty, mainly owing to the intercession of Jason, tyrant of Pherae, and Alcetas of Epirus. Timotheus' resources were exhausted by the expenses of the trial, and his real estate was heavily mortgaged. In order to entertain these potentates who were his guests during the trial he was obliged to appeal to Pasion again. "It was evening when they arrived at his house in the Piraeus, and he not having the means to entertain them properly sent Aeschrion his lackey to my father to borrow some bed covers and cloaks, two silver cups and a mina in silver." After the departure of the distinguished guests the cloaks and bed covers were returned but the cups and the money were retained. It appears that the cups were not the property of Pasion but had been left in the bank for safekeeping by one Timosthenes, a friend of Phormio who was at that time the accountant. When the owner called for the silverware Pasion had to pay the price. The amount was charged to Timotheus.

On another occasion Timotheus, desiring to keep the allied Boeotian fleet in commission in order not to increase the public irritation against himself by a further collapse of the campaign for which he was responsible, borrowed from Antiphanes one thousand drachmas to pay the Boeotian crews. In order to escape the importunities of the new creditor he secured a loan from Pasion to discharge the debt. At a later date Timotheus took service with the king of Persia. Before embarking

he introduced to Pasion a shipowner named Philonidas and asked Pasion to pay him the freight on some timber from Macedonia for his new house. This brought the total indebtedness up to about nine hundred dollars. Without going into the details of the case one point of interest may be noted. The defense of the general was that the money was loaned not to himself but to the persons to whom it was paid. The carelessness of Pasion in not securing documentary evidence of his transactions with Timotheus was in part due to the imperfect methods of banking in vogue. Drafts, checks, and promissory notes were unknown. The evidence of the nature of the transactions between the banker and his customers were the books of the bank and the testimony of the clerks who received or paid out the money. As the clerks were usually slaves their evidence was not available. Apollodorus admits that his father was anxious to oblige Timotheus "in order that he might have influence enough with him to obtain any favor he might ask." Here is a partial explanation of the banker's laxity. Being a man of humble origin and anxious to make friends in high places, he did not insist on documentary evidence fearing that Timotheus might be offended. Apollodorus tried to force Antiphanes to give evidence but he refused to appear, and Apollodorus entered suit for damages presumably to cover the amount of the loan in case Timotheus succeeded in evading payment. As usual we do not know the outcome of the case. Plutarch says Apollodorus won, but his statement is no more reliable than his assertion that Demosthenes composed the speech. Some ground for concluding that Timotheus was successful is

afforded by the fact that at a later time Apollodorus brought a criminal action against him in connection with his defeat when in command of the Athenian forces at Amphipolis in 360 B.C. It was characteristic of Apollodorus to let slip no opportunity for revenge on his enemies by prosecuting them for public offenses.

In *Callippus* v. *Apollodorus* we have an example of a suit in which Apollodorus was the defendant. The case, according to Apollodorus, was as follows. Lycon, a Heraclean, being about to sail for Libya instructed Pasion to pay over to his partner Cephiades of Scyrus a sum of money which he had on deposit in the bank. Apollodorus says:

> It is the custom of all bankers, when anyone deposits a sum of money with directions to pay it to another, first to write down the name of the person making the deposit and the amount, then to enter on the margin that "it is to be paid to this or that person"; and if they are acquainted with the person to whom they are to pay they write nothing more; but if they are not acquainted with him they add the name of the one who is to identify him.

Lycon never reached his destination. His ship was attacked by privateers and the cargo was taken to Argos where Lycon died of wounds received in the fight. Some time after the death of Lycon, Callippus, an Athenian who acted as consul for citizens of Heraclea, appeared at the bank and asked to inspect the account of Lycon. He read the entry and went off without making any comment. Some months afterward he met Pasion in Athens and asked if the money of Lycon had been paid over yet. Pasion was not sure and suggested that he inquire at the bank in the Piraeus. But Callippus con-

tented himself with asking Pasion to notify Cephiades when he came to collect the money that he disputed his right. If, however, the money had been paid he was to tell Cephiades that the consul of the Heracleans had appeared at the bank with witnesses and demanded that the money or the man who received it should be produced. It is not clear on what ground Callippus claimed the money. Pasion did finally pay over the money as originally directed, at the same time notifying the payee of the threat of Callippus. Three years later Callippus entered a suit for damages against the banker "charging that Pasion had injured him by paying Cephiades the money which Lycon of Heraclea had left with him without his [Callippus'] consent after promising not to pay it." The case was withdrawn from court and turned over to arbitrators agreed upon by the parties, but Pasion died before an award was made. Callippus then sued Apollodorus, not for damages, but for the amount of the deposit. The case was referred by consent to arbitration. The arbitrator pronounced in favor of Callippus, but as he gave his decision without taking an oath as the law required the award was void. The failure of the arbitration threw the case back into court, and the present trial was the result. The outcome is unknown, and it is futile to speculate. Apparently, Callippus had no documentary evidence such as a will and was dilatory in prosecuting. Under these circumstances Apollodorus was justified in resisting a claim which his father had refused to recognize.

Apollodorus v. *Nicostratus* well illustrates the tendency of one suit to bring on another. A certain Arethu-

sius was a state debtor. To frustrate as far as possible attempts on the part of state debtors to conceal their effects citizens who succeeded in discovering concealed property by the process of "inventory" were rewarded with three-fourths of the proceeds. Apollodorus brought such a suit claiming that certain slaves in the possession of another were really the property of Arethusius and liable to confiscation. Apollodorus begins his speech by protesting that his purpose is to exact vengeance for the outrageous wrongs he has suffered at the hands of the defendant and his brother Nicostratus. To prove that he is not a mere professional informer and sycophant attracted by the prospect of financial gain he renounces in advance all financial benefits that would accrue to him in case of success. He then proceeds to set forth in picturesque detail the most flagrant wrongs he has suffered at the hands of Arethusius and his brother. Nicostratus was a near neighbor and warm friend of Apollodorus in the country. So intimate and friendly were they that Nicostratus was in the habit of taking charge of Apollodorus' property during his absences from home. On one occasion when Apollodorus was absent on state service as trierarch three of his slaves ran away. The rest of the interesting story is best told in Apollodorus' own words.

While pursuing these slaves Nicostratus was himself taken prisoner by a privateer and sold into slavery. On my return being told of his unhappy plight by one of his brothers I supplied the latter with travelling expenses and thus enabled him to go to the rescue of Nicostratus. On his return from slavery Nicostratus informed me that he had been ransomed for a considerable sum and appealed to me with tears in his eyes and pointed to the scars left by the galling fetters. He thus induced me to forgive him the

three minas I had advanced for his brother's travelling expenses and to contribute towards the twenty-six minas which he owed for his ransom the sum of ten minas which I raised by mortgaging an apartment house. Not many days afterwards he came to me again and told me with tears in his eyes that the persons who had advanced the ransom money were demanding payment of the remaining sixteen minas and that the agreement required him to refund the money within thirty days or failing payment to be liable for twice the amount. He asked me to advance the balance as otherwise my former gifts would be thrown away. Accordingly I raised the money and lent it to him for a year without interest. On the receipt of the money he showed no gratitude but at once began to plot to defraud me, calculating that owing to my youth and inexperience I could be driven to desist from attempting to collect the money he owed me.[3]

At this time Apollodorus was engaged in litigation with Phormio. Nicostratus, being familiar with the pleadings, disclosed them to Phormio and put Apollodorus at a serious disadvantage. Next in connection with some suit in which he was engaged, probably to recover the loan from Nicostratus, a *duces tecum* writ was issued against Apollodorus. On the basis of a false affidavit of service Apollodorus was fined for failing to answer the summons. Then when he proposed to go on with his suit against Phormio he was threatened with imprisonment for failure to pay the fine. Again by means of a false affidavit of service Arethusius procured a judgment against him as debtor to the treasury and levied on his property, carrying off furniture from his house worth twice the amount of the judgment. Apollodorus paid the debt to the treasury and indicted Arethusius for false summons. What followed is thus told by Apollodorus:

[3] Summarized by Sandys and Paley, *op. cit.*, II, 150.

He came at night into my farm, cut off all the valuable fruit grafts that were there and also the young trees that were in the shrubbery, and broke down the enclosed plantations of olives; not enemies in war would have made such cruel havoc as he did. In addition to this they sent to my farm in daylight a boy, the son of a citizen, and bade him pluck the flowers in my rose bed so that if I caught him and struck him in a passion or put him in bonds taking him for a slave they might indict me for assault and battery.

Apollodorus did not resort to violence but merely called in witnesses to the damage he had suffered.

My indictment of Arethusius had come up for preliminary hearing and I was on the point of taking it before a jury. He lay in wait for me near the stone quarries, as I was coming up late from the Piraeus, gave me a punch with his fist, grabbed me around the waist and would have hurled me into the stone quarries had not some persons attracted by my cries come running up to my assistance. A few days afterwards I went into court and proved that he had falsely attested the summons and had done me the other injuries I have mentioned and secured his conviction. When it came to the question of punishment the jurors were inclined to sentence him to death; I begged them, however, not to do anything at my instance but to consent to the fine which the defendant had proposed, a talent—not that I had any desire to spare Arethusius but that it might not be said that I, son of Pasion, who had been created citizen by decree of the people, had caused the death of an Athenian.

Theomnestus v. *Stephanus et Neaera* is another example of what may be called spite litigation. Theomnestus is the nominal plaintiff but Apollodorus is the real prosecutor. The plaintiff made a short introductory statement of the case and the motives that impelled him to bring a public action against Stephanus. "I enter

upon this trial not as an attacking party but by way of retaliation, for Stephanus first began the quarrel without having sustained any harm from either of us in word or deed." Apollodorus was married to the sister of Theomnestus who in turn married one of their daughters, his own niece. As a member of the senate during the war against Philip of Macedonia, Apollodorus had secured the passage of a bill providing that the people should decide whether they wished to apply the surplus of the public expenditure to military or theoric purposes, i.e., for public entertainments. In accordance with the provisions of the measure the people voted unanimously to apply the surplus to military purposes. Now there was a law on the statute-book providing that during wars all surpluses should be used for military purposes without a special vote. In effect this law was repealed by the bill of Apollodorus notwithstanding the fact that the people did actually vote to appropriate the money in accordance with the requirement of the existing law. But in Athens a special procedure was required for the introduction of new legislation that superseded an existing law. If the sponsor of the new law failed to observe the procedure the law if passed could be attacked in the courts. The mover was also personally liable for one year. Stephanus indicted the bill within a year and attacked Apollodorus so vigorously in a scathing review of his whole career that he secured a verdict against him. He demanded a fine of fifteen talents, well knowing that Apollodorus being unable to pay it would lose his franchise. Finally, the jury assessed a fine of one talent. Stephanus, not satisfied, persisted in his plan to ruin

Apollodorus. He accused him of killing a woman during an attempt to recover a fugitive slave. Suborning some slaves who he claimed were freemen, natives of Cyrene, he indicted him for homicide. But the plot failed and Apollodorus was acquitted. It appeared that Stephanus had been hired by two citizens to secure the banishment of Apollodorus.

The motive of Theomnestus in attacking Stephanus was not merely excusable but meritorious in the eyes of the Athenians.

> I was exhorted on all sides by people who came to me privately, to take vengeance on him for the injuries he had done us. They reproached me, saying that I should be the greatest coward in the world if I did not redress the wrongs of a father-in-law, a sister, and a wife.

He touches lightly on the service he was doing the state in bringing a lawbreaker to justice. The reason is obvious, for Stephanus could reply that he too was enforcing the law and moreover that the jury in convicting Apollodorus of illegality had justified him. In prosecuting Nicostratus some years before Apollodorus took pride in the fact that he had not tried to escape personal responsibility in case of failure by securing the services of a nominal accuser who would be willing for a consideration to run the risk of a heavy fine if he failed to obtain at least one-fifth of the votes. This is significant. A long time had elapsed between the Nicostratus suit and the present prosecution. Evidently Apollodorus had in the meantime acquired an unenviable reputation for litigiousness and felt safer in the rôle of advocate.

Quite a different aspect of the career of Apollodorus

is exhibited in *Apollodorus* v. *Polycles*. Like other rich Athenians, Apollodorus was required to perform state services involving the expenditure of large sums according to the Athenian plan of conscripting wealth both in peace and in war. In 362 he was assigned a warship to maintain under his command for a period of six months. The trierarch was required to launch the ship and keep the hull and tackling in repair unless he could prove the damage suffered was due to storm or battle. But it had gradually become the practice of trierarchs to do much more in the way of adding to the equipment. Apollodorus, being anxious to display his liberality and his appreciation of the privileges of citizenship, went far beyond the actual needs of the situation.

When I found that the sailors put on the roll by the citizens did not make their appearance, except a few who were incapable, I dismissed them and having mortgaged my estate I was the first to man my ship, hiring sailors of the best possible quality by giving large bounties and payments in advance. I also furnished my ship with tackle entirely of my own without taking part of the public stock; I fitted it out most handsomely and made a more splendid show than any of the trierarchs.

Polycles, his successor in the trierarchy, constantly refused to take over the ship on the expiration of the term of Apollodorus.

He asked me why I was the only captain who had ship's furniture of my own. Have you so far outstripped everybody in wealth that you are the only captain with furniture of his own and gilded ornaments? Who can endure your madness and extravagance, a crew corrupted and accustomed to receive large sums of money in advance and to enjoy exemption from regular duties of the ship and to enjoy the pleasures of a bath? . . . . You have been the

teacher of bad practices in the navy. It is partly owing to you that the troops of other captains become vicious.

The motive of Apollodorus in going to all this expense was well understood by Polycles who on one occasion after reiterating his refusal to take over the ship shrewdly remarked: "The mouse is beginning to taste pitch; he would be an Athenian citizen."

The admiral Timomachus was undoubtedly negligent in not forcing Polycles to do his duty. It was alleged that Polycles lent the admiral a sum of money on condition that he be not compelled to assume the trierarchy. Then, too, under Apollodorus the ship was the best equipped and managed in the fleet and always ready for service. And Apollodorus, being a *novus civis,* was readier to undertake dangerous and tedious commissions. But on one occasion he refused to undertake a service that would have resulted in a breach of the laws. Callistratus was an Athenian exile under sentence of death sojourning in Methone. Wishing to join Timomachus, the admiral who was his son-in-law, he requested that a ship be sent to convey him to Thasos. Apollodorus was selected for the mission without being informed of its nature. In the course of the voyage a sailor informed him that the ship was to be put at the disposal of an exile. As it was illegal to harbor exiles Apollodorus refused to proceed. Accordingly, the admiral was obliged to seek other means of aiding his father-in-law and never forgave Apollodorus.

At the end of the campaign Apollodorus was commissioned to take Lycinus, the successor of Timomachus, to Athens. Before setting sail he again in the pres-

ence of witnesses called upon Polycles to take over the ship. "My object was to deprive him of the pretext which he might set up in his defense, namely, that I refused to deliver the ship to him from an ambitious motive, wishing to return home in a fast sailing ship and to show off to you my costly outlay." The demand was refused. Polycles also refused to lend money on the security of the ship's furnishings. It is a tribute to his father Pasion that Apollodorus was able in these straits to raise money in Tenedos. "Through my being Pasion's son and his being on terms of friendship with many foreigners in Greece I had no difficulty in borrowing money where I wanted it." On returning to Athens at the end of his extended term of service he brought suit to recover the expenses incurred during the term he served for Polycles.

Apollodorus' experiences as trierarch furnished him with considerable material for criminal prosecutions. Suits against Timomachus, Autocles, and Menon, successive commanders under whom he served as trierarch, followed. Nothing is known of these cases. Phormio cites them as instances of Apollodorus' vexatious litigious activities. It seems quite likely that these officers were charged with wrongdoing in their official capacity. In *Apollodorus* v. *Polycles* the plaintiff remarks incidentally that the troops found these admirals unreliable in the matter of supplies and pay. The charge against Timomachus had almost certainly to do with his illegal relations with the fugitive Callistratus. Not only had he sent Apollodorus to convey him to Thasos where he planned to meet him, but when Apollodorus refused to

execute the commission he induced Callippus to undertake it. As Callistratus was under sentence of death anyone who afforded him aid and comfort was liable to the same penalty. And it is known that Timomachus was condemned and executed. A suit against Callippus is also mentioned. He is not the Callippus of *Callippus* v. *Apollodorus* already discussed. There is little doubt that he was the individual who acted as the agent of Timomachus in his dealings with his exiled father-in-law, Callistratus. He was in charge of Apollodorus' trireme when it was dispatched to be put at the disposal of the exile. When Apollodorus refused to continue the voyage Callippus in anger threatened him, but without avail. It was Callippus who induced another more pliable trierarch to turn over his ship for the use of the exile who did in fact make full use of it. Thus Callippus was involved equally with Timomachus in guilt. It is known that he was not put to death. He may have been acquitted on the plea that he was acting under the orders of his military superior. In these prosecutions Apollodorus was actuated in part by his desire to serve the public interest by bringing public offenders to justice, but he no doubt welcomed the opportunity to revenge himself upon the admiral Timomachus for his failure to put pressure upon Polycles. He was also incensed at Callippus for his threats and insults when he refused to do his bidding in the matter of Callistratus.

The disputes between Apollodorus and his stepfather Phormio were aired in court more than once. Pasion left an estate well over one hundred thousand dollars in value. In view of the higher purchasing power of money

in those days as well as the much higher rates of interest Pasion was a wealthy man. Shortly after his death his widow Archippe, in accordance with terms of the will, married Phormio. The marriage took place during the absence of Apollodorus on public service. On his return he contemplated taking legal action, but owing to the war court sessions were suspended and he was debarred from bringing a civil suit. Consequently he brought a criminal action against Phormio. Both the nature and the purpose of this suit have been misunderstood by modern students of Greek law. It is clear from subsequent litigation that Apollodorus denied the genuineness of the will under which Phormio acted. The purpose of the projected civil action was no doubt to test the validity of the will. If the will was invalid then Apollodorus was his mother's legal representative; without his consent she could not marry. And so Phormio in contracting an unauthorized marriage with her had committed a technical assault. By bringing an action for assault Apollodorus could have tested the validity of the will quite as well as by a civil suit so far as the form of the action is concerned. The case never came to trial. Apollodorus speaks vaguely of the dilatory tactics of Phormio, but it is clear that the intercession of Archippe who apparently was satisfied with the marriage induced Apollodorus finally to drop the matter. Eight years after the death of Pasion his younger son came of age and Phormio was duly discharged from all liabilities connected with his guardianship and the lease of the bank and the shield factory. Two years later Archippe died and Apollodorus started suit to recover a sum of money

which he claimed was due him from her estate. The case went to arbitration and Phormio agreed to a settlement. According to Phormio, the settlement included a blanket discharge from all liabilities and claims on the part of Apollodorus. But ten years later Apollodorus brought suit for twenty thousand dollars which he alleged were advanced by his father as banking stock when Phormio first leased the bank. Phormio entered a special plea on the ground that he had twice been discharged from all liability in connection with the estate and that the suit contravened the statute of limitations which fixed a period of five years for bringing such suits whereas the plaintiff was bringing suit after the lapse of more than twenty years. But technical pleas were not popular with Athenian juries and the friend who spoke for Phormio devoted the major part of his speech to arguing the case on its merits, a course which was not contrary to Athenian practice. The chief advantage of a special plea was that it permitted the defendant to speak first. The outcome of the case is best set forth in Apollodorus' own words in a later phase of the litigation.

> Phormio got the advantage of the opening speech by reason of there being a special plea. Then having made a variety of representations to suit his case he made such an impression on the jury that they would not listen to a single word from me. Failing to obtain a fifth part of the votes I of course paid the penalty for such a failure.

In this kind of case it was one-sixth of the amount claimed, about thirty-five hundred dollars. Undismayed by this signal defeat Apollodorus sought to reopen the case by charging Stephanus, one of Phormio's witnesses,

with perjury. The two speeches delivered by Apollodorus in this case have been preserved. As is usual in Athenian practice, they are largely devoted to reviewing the original case and answering the arguments of Phormio. In this respect the litigation between Apollodorus and Phormio is unique. Both sides of the case are available. Elsewhere we must depend upon *ex parte* statements alone. There is no indication as to the outcome of the suit. In view of the jury's refusal to listen to Apollodorus in the main suit there would seem to have been small hope of a favorable verdict even if he succeeded in reopening the case by securing the conviction of Stephanus for perjury. This was the last appearance of Apollodorus in litigation of which we have any knowledge. Owing to his extravagance and ill-advised litigation, he had at the age of forty-five squandered the handsome fortune of fifty thousand dollars left him by his father. It would be a mistake to suppose that there was any considerable number of Athenian citizens as litigious as Apollodorus. His career is instructive regarding the various kinds of litigation in which a man possessed of considerable wealth, fired by zeal for the public service and ever ready to punish personal enemies by haling them into court, might become involved. Within a period of twenty years nearly twenty suits in which he was either plaintiff or defendant are mentioned, and many others are implied in the various remarks about his activities in litigation.

CHAPTER VIII

FORENSIC ORATORY

Aristotle approves of the requirement that every citizen should take his own case in court; it is quite as reasonable to expect a man to use his tongue as his hands in defending himself. But it may be pointed out that while the whole body of citizens could be taught the use of arms and military drill a knowledge of rhetoric could not be imparted in this wholesale fashion. Indeed, the state made no effort to teach it at all. The requirement was due to the idea that every citizen should participate as much as possible in the activities of the community to which he belonged. It was the policy of the state to do nothing for its citizens which they could do for themselves. If a man could be drafted to serve the state as soldier, magistrate, or judge it seemed only reasonable to expect him to present his case and protect his interests before his fellow-citizens assembled in court or Ecclesia.

Under the pre-Solonian system when the magistrates had final jurisdiction in the cases that came before them it was perhaps not unreasonable to expect a citizen to argue his case in court. There was neither occasion nor need for oratorical display. An audience of one does not encourage rhetorical and emotional appeals. But the institution of large popular juries by Solon and the advent of the professional accuser fundamentally changed the conditions of litigation. The litigant had now to face an audience of several hundred that appreciated oratory

and listened readily to appeals to its passions and its prejudices. Neither was it averse to giving expression to its disapproval and its dislikes in a very disconcerting fashion. Moreover, the habitual accuser, whether a self-seeking sycophant or a zealous public-spirited citizen, soon acquired some skill in public speaking and familiarity with all the twists and turns of litigation. Under these circumstances a novice who was haled into court was in a serious predicament. Nothing but a carefully prepared and well-delivered speech would serve his purpose. It is not strange that young men betook themselves to the study of oratory.

In all periods of her history Greece had produced eloquent public speakers. From the time of Homer onward a great leader is always described as a man of speech as well as of action, "a speaker of words and a doer of deeds." In the earlier period oratory was a faculty or natural gift improved by practice and empirical cultivation. It was not yet an art that could be communicated to others. There was no theory of rhetoric. But about the middle of the fifth century political oratory was developed in Sicily. On the overthrow of the tyrants throughout the island there arose vigorous and successful democracies. To the turbulent rivalries in the popular assemblies and the immense amount of litigation that resulted from efforts to recover property seized by the tyrants for their adherents the art of rhetoric owes its birth. Corax of Syracuse was a practical politician who had achieved considerable success in the new democracy. An examination of the process by which he persuaded his hearers and maintained his leadership re-

vealed to him the threefold division of his speeches: the proem (προοίμιον), in which he sought to gain good will and an attentive hearing; the narrative and argumentative portion, which he called λόγος; and, finally, the epilogue (ἐπίλογος), containing a brief summary of arguments and an appeal. Simple though this first step now seems it was nevertheless a great discovery. Here was a foundation upon which a system capable of being taught to others could be built. Oratory was no longer conceived subjectively but objectively. It had ceased to be a mere faculty; it had become an art.

The new art found its way to Athens through various channels about the middle of the fifth century, where it was welcomed by the populace mainly because it enabled them to avail themselves fully of their political rights. The constitutional reforms of Cleisthenes had put political power within reach of the masses. But owing largely to their lack of political training and of self-confidence they were unable to grasp it; they continued to be ruled by the old landholding aristocracy. The successful Persian wars with the consequent growth of sea power and commerce brought wealth and confidence to the middle classes. But it was not until the power of the Areopagus, the ancient aristocratic council and center of reaction, was broken that the way was clear for the full exercise of popular sovereignty in the Ecclesia and the dicasteries. It was at this critical period in the history of Athenian democracy that the new rhetoric put into the hands of the popular leaders the means of directing the assembly and influencing the courts. For the average citizen obliged to face an experienced prosecu-

tor or plaintiff before a numerous jury it afforded a welcome means of aid.

The knowledge of rhetoric spread rapidly. Just as in our own time in answer to the demand of industry and business for specially trained recruits business colleges, correspondence schools, night classes, and other educational agencies have appeared to supplement the regular education, so in Athens and in Greece generally there appeared the Sophists, exponents and purveyors of a new learning. Some set up schools with organized courses on rhetoric and allied subjects extending over several years. Others traveled from city to city giving public lectures and private lessons. These ancient educators like their modern descendants ranged all the way from sincere and capable men like Protagoras, Hippias, and Prodicus to the pair of worthies immortalized by Plato in the *Euthydemus*. These charlatans professed to be able to refute any proposition whether true or false, and to impart their skill for a consideration to anyone regardless of previous condition of incapacity, and without interfering with his business. There was no regular scale of fees. Prodicus charged a drachma a lesson and fifty drachmas for a complete course on words and their uses. Euenus of Paros taught all virtue for five minas, and Protagoras gave a complete education for one hundred minas. But a dissatisfied student had the option of putting his own valuation on the instruction provided he swore to it in a temple. It is surprising to learn that Protagoras left an estate valued at five talents. Hyperbolus, a prominent lawyer and politician, is said by Aristophanes to have learned "evasion of a suit, persuasive counter-argument

and summons for a talent." Callias, the son of Hipponicus, a famous dilettante, was an eager hearer of all the Sophists who came to Athens, including Protagoras, Gorgias, Hippias, and Prodicus. The scene of Plato's *Protagoras* is laid at his house where Hippias, Prodicus, Protagoras, and their retinues were sojourning. He achieved the distinction of being mentioned in several of Plato's dialogues, in Xenophon's *Symposium* in which he was the host, and in several of Aristophanes' comedies. In the end he died in poverty, having squandered a large fortune in riotous living and education.

The curriculum of the new education included rhetoric, dialectic, physical science, mathematics, and philosophy. As the chief purpose was to fit young men for public life, rhetoric occupied the most important place. This subject was particularly desirable for those who wished to learn to defend themselves in court. In fact, Gorgias, according to Plato, went so far as to claim that if one learned the art of persuasion he might dispense with all the other arts. "Is it not a great blessing, Socrates, not to have learned the other arts, but the art of rhetoric alone, and yet to be in no wise inferior to the professors?" This doctrine sounds familiar to a generation that has heard professional educationists rate knowledge of the art of teaching higher than a knowledge of the subjects taught.

Those who first practiced and taught the art of public speaking in Athens had to devise a linguistic medium suited to their purpose, for Attic prose had not yet been developed. Ionians had recorded myths and formulated philosophies either in the free and easy idiom of daily

life or in an elaborate poetical diction. Accordingly, when Solon in the sixth century wished to publish his political views and theories he chose Ionic poetry as the medium. In the next century Herodotus of Halicarnassus standardized Ionic prose by using it in his great history of the struggle with Persia. But by this time Ionic was no longer possible in Athens, for the great dramatists had firmly established Attic as the medium of literary expression. Prose must be written in the Attic dialect. The makers of Attic prose desired something "more precise than poetry and firmer and more compact than the idiom of conversation."[1] The speeches of Antiphon, the first great Athenian lawyer, show evidences of the struggle. He achieved, however, a dignity of expression quite distinct from the loose style and crude phrasing of the first bit of Attic prose, a political pamphlet on the Athenian constitution (424 B.C.), wrongly attributed to Xenophon, extracts from which appear in a previous chapter. But the influence of poetry is seen in his lack of precision in the use of words, and the occurrence of a considerable number of poetic words and phrases. His language is closer to that of the tragedians than to the matured forensic prose of his successors. The great lawyers who were in touch with realities utilized the teachings of rhetoric with discretion and skill and succeeded in evolving a type of forensic oratory admirably adapted to the needs of the ordinary citizen who had to appear in a court of justice. Of necessity they required a technical vocabulary, but it was chosen entirely from the current speech and was easily understood by any intelligent per-

[1] Jebb, *The Attic Orators.*

son. In this respect there is a marked contrast between Athenian legal language and our own, which has preserved from an earlier age and a foreign tongue many words and expressions quite unintelligible to the layman. In Athens, it is true, a limited number of obsolete words occurred in the old statutes, but according to Lysias they presented no difficulty to an intelligent person. Socrates, contrasting forensic oratory with the language of daily life, such as he himself used, calls it "flowery language tricked out with fine words and phrases." Isocrates, on the other hand, contrasting it with ornate epideictic oratory, describes it as "a simple style of speech devoid of adornment." There is no real discrepancy between these descriptions. In fact, they show how effectively the creators of forensic prose did their work, avoiding both the language of everyday life and the diction of epideictic oratory. It was a comparatively plain but vigorous style sparingly adorned and varied with figures of language and of thought, well calculated both to please the ear and convince the mind. Lord Brougham has observed: "There is hardly one of the political or forensic orations of the Greeks that might not have been delivered in similar circumstances before our senate or tribunals." Three Sophists stand out prominently among the founders of Attic prose: Protagoras, Prodicus, and Gorgias. Protagoras insisted upon orthoepy or correct accidence. Prodicus did great service by "discriminating words which express a slight modification of the same idea, and which therefore were not ordinarily distinguished by the poets or in the idiom of daily life." Plato has preserved an amusing example of his pedantic pro-

fessorial protests against the carelessness of the ordinary speaker.

"That," said Prodicus, "seems to me to be well said, for those present at such discussions ought to be impartial hearers of both speakers; remembering that *impartiality* is not the same as *equality,* for both sides should be impartially heard. And yet an equal meed need not be assigned to both of them; but to the wiser a larger meed should be given and a lower to the less wise. And I as well as Critias would beg you, Socrates, to grant our request, which is that you will *argue* with one another and not *wrangle;* for friends argue with friends out of good will but only adversaries and enemies wrangle. And then our meetings will be delightful; for in this you who are speakers are more likely to win *esteem* and not *praise* only, among us who are your audience; for esteem is a sincere conviction of the soul but praise is often an insincere expression of men uttering words contrary to their conviction. And thus we, the hearers, will be *gratified* and not *pleased;* for gratification is of the mind when receiving wisdom and knowledge, but pleasure is of the body when eating or experiencing some other bodily delight." . . . . Thus spoke Prodicus and many of the company applauded his words.

While Protagoras and Prodicus emphasized precision and accuracy in the use of language, Gorgias insisted upon beautiful expression. He used a considerable number of poetical words and by means of assonance and symmetry between clauses he secured a strongly marked prose rhythm. His style is thus described by the historian Diodorus when he recorded his visit to Athens in 427 B.C.: "He was the first to employ the more unusual and more artificial figures of speech, such as symmetry of clause, parallelism of structure, similarity of termination and the like."[2] He gave his name to a distinctive

[2] Translated by Roberts.

style which had a marked influence on Isocrates; it reappears sporadically and independently in all subsequent literature. Lyly's *Euphues* or the *Anatomy of Wit* introduced the Gorgian style into Elizabethan literature. Sir Walter Scott successfully reproduced its more striking features in *The Monastery,* and Shakespeare parodied it most delightfully in *Love's Labour's Lost.* Even newspaper-writers who have never heard the name of Gorgias employ some of the more obvious of his devices. Only a few fragments of Gorgias' genuine writings survive, but we have in the famous defense of Helen of Troy a contemporary imitation of his style that long deceived the critics. The attempt has been made in the following version of a portion of it to reproduce the more distinctive features of the original so far as the resources of the English language will permit:

2. It is the duty of the same man to propose the right truly and expose the wrong duly, to confute the critics of Helen, a woman regarding whom the praise of poets and the faith of audiences have been harmonious and symphonious. The reputation of her name accounts for the celebration of her fame. But I desire by a rational account to free an ill-famed lady from imputation and, exposing her vilifiers as falsifiers and disclosing the truth, to end their hallucination.

3. That in nature and nurture the lady was the fairest of the fair is not unknown even to the few. For it is known that her maternity was of Leda, her paternity irrefutably immortal, reputedly mortal, of Tyndareus and Zeus, of whom the one was reputed by fame, the other reported by claim to be her father. The former was the mightiest of humanity, the latter the lordliest of divinity. . . . .

6. She did what she did either by the wish of fortune, the will of the gods and the weight of fate, or invaded by force or per-

suaded by argument or pervaded by love. If owing to the first the maligner deserves to be maligned. For divine disposals cannot be checked by human proposals. It is not natural for the stronger to be checked by the weaker but for the weaker to be governed and guided by the stronger. The stronger leads, the weaker accedes. God is stronger than man in prescience and violence. Therefore if fate and god are to be implicated in blame Helen must be extricated from ill-fame.

7. If she was forcibly abused and illegally ill used and unjustly misused clearly her violator and desecrator was a reprobate and she being desecrated and violated was unfortunate. The barbarian who barbarously in word, in law, in deed did perpetrate the rape deserves blame in word, ill-fame in law and shame in deed. But Helen violated, from fatherland separated, and from friends segregated ought reasonably to be commiserated rather than berated. For he committed outrages, she submitted. It is just then to sympathize with Helen and to anathematize him. . . . .

19. If, then, the eye of Helen charmed by the beauty of Alexander filled her soul with excitement and amorous incitement, what wonder? How could the weaker repel and expel him who being divine had divine power? If love is a bodily debility and a mental imbecility, we should not execrate it as an error, but deprecate it as a terror. For it comes to its victims by the behests of chance and not by the requests of sense, and by the contrivance of the heart and not by the connivance of art.

20. How then, is it fair to blame Helen who, whether by love invaded or by argument persuaded or by violence subjugated or by divine necessity dominated, did what she did and is absolutely absolved from blame?

21. By my discourse I have freed her from infamy; I have kept the promise which I made in the beginning; I aspired to dispose of the injustice of defamation and the folly of allegation; I desired to compose a discourse encomiastic for Helen and gymnastic for myself.[3]

[3] I am much indebted to Van Hook's rendering of portions of the *Encomium of Helen* which appeared in the *Classical Weekly*, VI, 122 ff.

The itinerant Sophist introduced himself to a new city by means of a public lecture composed in his best style with a few complimentary local references, or a series of private receptions and exhibitions if he was fortunate enough to have an acquaintance among the citizens who was willing to entertain him. In Athens the home of Callias, the son of Hipponicus, was always open to Sophists sojourning in the city. If he made a good impression he was sure to find plenty of young men eager to take the courses he offered. The more distinguished visitors drew large and enthusiastic audiences. When Gorgias of Leontini visited Athens in 427 B.C. as head of a diplomatic mission from his native city his oratory caused a great sensation in the assembly. "His distinguished style," says the historian Diodorus, "appealed irresistibly to the Athenians' ready wits and love of oratory. By giving private exhibitions of his art and teaching young men he carried away large sums of money." According to Plato, Prodicus had a similar experience in Athens. Coming on a political mission from Cos he made such an impression on the senate that his private exhibition and courses of instruction were eagerly attended. The eagerness of a youthful Athenian to hear a famous teacher is vividly described in the *Protagoras* of Plato. Socrates relates to a companion the excitement of

---

The possibility of reproducing in English the distinctive features of the Gorgian style was first demonstrated by Professor Paul Shorey, of the University of Chicago, who used to regale and edify his classes in "The Attic Orators" with versions of choice passages. One of these (sec. 19) I am fortunate enough to be able to reproduce from the margin of my text.

a young friend Hippocrates on hearing that Protagoras had come to the city.

> Last night or rather very early this morning Hippocrates the son of Apollodorus gave a tremendous thump on my door with his staff: some one opened to him and he came rushing in and bawled out, "Socrates, are you awake or asleep?" I recognized his voice and said, "Hippocrates, is that you and do you bring good news?" "Good news and nothing but good." "Delightful," I said, "but what is the news and why have you come hither at this unearthly hour?" He drew nearer me and said, "Protagoras has come." [Socrates pretends not to understand the cause of his young friend's excitement and asks,] "What is the matter, has Protagoras robbed you of anything?" "Yes indeed he has, Socrates, of the wisdom which he keeps from me." "But surely if you give him money and make friends with him he will make you as wise as himself." "Would to heaven that this were the case. He might take all that I have and all that my friends have, if he pleased."

Socrates consents to go with him at daybreak and induce Protagoras to impart his wisdom for a consideration. Meanwhile, he questions Hippocrates as to what he expects to learn. Hippocrates is not quite clear on this point. Protagoras presides over the art that makes men eloquent, and eloquence, he believes, is part of the education of a freeman and a gentleman. In Plato's *Apology* Socrates affects to be surprised that the young men of the various cities of Hellas were grateful for the opportunity of paying large sums of money to Gorgias, Hippias, and Prodicus for instruction when their elders were able and willing to instruct them without money and without price.

None of the show pieces of the earlier Sophists has been independently transmitted, but notices and summaries in contemporary literature enable us to obtain

some notion of those of the better class. In the *Memorabilia* of Xenophon, Socrates repeats from memory the substance of a speech often delivered by Prodicus entitled "The Choice of Hercules." It is an elegant and edifying discourse on virtue which compares favorably with modern disquisitions on the same subject. And Hippias is represented by Plato as relating with pride what a fine impression he made in Sparta with a moral discourse entitled "Nestor's Advice to Neoptolemus." Within a few days he was to repeat it and a number of other fine pieces well worth hearing in the school of Pheidostratus by request. He invited Socrates to be present and to bring any others who were capable of appreciating such things. Of quite a different character is the oration of Protagoras on the myth of Prometheus and Epimetheus which Plato has preserved. It is an account of the origin of the race and the development of civilization, intended to show that virtue can be taught. Others, abandoning the familiar moral themes, tried to appeal to the Athenians' love of novelty which was as marked in the fifth century B.C. as the apostle Paul found it in the first century A.D. by ingenious orations on such trivial themes as bees and mice and salt and pots and pebbles. In this way they avoided the commonplaces and the platitudes of their rivals. A man who could be fluent on such humble and uninspiring themes would surely be brilliant and eloquent if he chose some of the trite and well-worn topics then in vogue. The Sophistic exhibitions did not always take the form of set speeches. In the *Euthydemus* of Plato, Socrates gives his friend Crito an ironical account of the performances

of a couple of charlatans, the brothers Euthydemus and Dionysodorus with whom Socrates pretends to have been much impressed. It is an amusing exposé of the sensational methods of some of the Sophists of the "common herd"—the eristics. Socrates reported that they claimed to be most skilful in legal warfare. "They will themselves plead in court and teach others to speak and to compose forensic speeches." There is no need to discuss in detail this brilliant satire which rivals the best efforts of Aristophanes. One example will suffice to show how by captious questions, quibbling answers, fallacies, and paradoxes they impressed the groundlings and won applause. Euthydemus begins by questioning a young protégé of Socrates as follows:

Q.: Are those who learn the wise or the ignorant?

A.: The wise.

Q.: Do they already know the thing they are learning?

A.: No.

Q.: Then the learners are the ignorant not the wise as you suppose.

Dionysodorus then takes the discomfited youth in hand.

Q.: Which of the schoolboys learns the dictated lesson, the wise or the ignorant?

A.: The wise.

Q.: Then the wise are the learners, not the ignorant, and your last answer to Euthydemus was wrong.

Amid shouts of applause Euthydemus returns to the attack.

Q.: Do these boys learn what they know or what they do not know?

A.: What they do not know.

Q.: But they know the letters?

A.: Yes.

Q.: And the letters make up the lesson?

A.: Yes.

Q.: Then they learn what they know and your answer was wrong.

Dionysodorus resumes the examination with the following result: To learn is to receive knowledge; to know is to have knowledge. The learners receive but have not knowledge. Therefore they who do not know, learn, not those who know.

The earlier teachers professed to teach their pupils to speak extempore in the assembly and the law courts. There was no sharp distinction between parliamentary and forensic oratory. Both were included under political or civil oratory. "I have heard," said Socrates to Protagoras on one occasion, "that you can speak and teach others to speak about the same things at such length that words never seem to fail, or with such brevity that no one could use fewer." Protagoras admitted that this was true. The earlier orators did not write their speeches. In fact, it is said that Pericles was the first to use a written speech in a law court. A debate regarding the relative merits of written and extemporary discourse began in the fourth century. There is still extant a speech of Alcidamas pointing out the advantages of knowing how to speak extempore. Isocrates was the champion of written discourse whom Alcidamas had in mind. But they were thinking of two quite different types of oratory. Isocrates, owing to a weak voice and a timid disposition, was totally unfitted to participate in the debates of the assembly or the duels of the law courts. Accordingly, he devoted himself to epideictic oratory. His

own compositions, apart from a half-dozen forensic speeches which he regarded as youthful indiscretions to be forgotten or disowned, consisted of carefully constructed political essays in the form of addresses to his own fellow-citizens in the assembly or to the Hellenes at the great national festivals. His topics, as he himself boasts, are "Hellenic, royal and political." Alcidamas, on the other hand, had in mind the everyday debates of the assembly and the struggles of the law courts. For these tasks a man must be able, as Alcidamas claims, "to speak extemporaneously, and appropriately to the occasion, to be quick with argument, and not to be at a loss for a word." The accuser could compose his speech at leisure, but no amount of forethought or forensic skill would enable the defendant to anticipate all the arguments of the accuser, or either of them to compose in advance his speech in rebuttal. Some facility in extemporary speaking was well-nigh indispensable. Alcidamas readily admits that conspicuous ability "is rare and the result of no ordinary training." It is not easy to determine how far Alcidamas and others like him were successful in their admittedly difficult task. The most elaborate training in writing might be of little avail. Isocrates, an acknowledged master of oratorical prose, intrusted his own defense to his adopted son when he was sued because he refused to undertake a trierarchy to which he was assigned. And Demosthenes though he was able to conduct his case successfully against his guardians for which he was able to make adequate preparation was hissed from the platform of the assembly which listened with attention, as Plutarch tells us, to "drunken sailors

and other illiterate fellows." Even when he had become a successful speaker in the assembly he would never consent to speak without adequate preparation. Isocrates vigorously denounced the teachers of forensic oratory as charlatans who promised more than they could perform. It is clear that the so-called "commonplaces" were an important feature in the teaching of the Sophists and contributed materially to such success as they achieved in teaching extemporary speaking. Students were required to commit to memory passages dealing with general topics that recurred more or less frequently in all forensic oratory but especially in the *prooemium*. The purpose of the *prooemium* was to win the attention and good will of the audience. The speaker usually tried to achieve these ends by setting forth the situation in which he found himself. While no two situations are ever exactly alike, the number of elements that enter into them is after all limited. Accordingly, the rhetoricians were quick to seize upon these common elements and reduce them to formulas or commonplaces. Not only were the various topics that might be advantageously introduced into the *prooemium* set forth in the textbooks but collections of proems suitable for all sorts of cases and occasions were published. There was no copyright and no prejudice against plagiarism. Indeed, it was felt that if a sentiment had been adequately and eloquently phrased once it might be freely used by anyone. So the litigant who had not mastered the topics of the proem and practiced combining them had only to turn over the pages of one of these collections and select one that could be easily modified to suit his needs. Even ex-

perts kept a stock of prefaces on hand. Cicero, the Roman lawyer and littérateur, in a letter to his friend Atticus shows how mechanical and perfunctory ancient prefaces were.

Now just notice my carelessness. I have sent you a book "On Glory" but there is the same preface in it as in the third book of the *Academics*. That results from the fact that I keep a volume of prefaces. From it I am accustomed to select one when I have begun some treatise. So being at the time at Tusculum, as I did not remember that I had already used that preface I put it into the book I sent you. When however I was reading the *Academics* on ship board I noticed my mistake. Accordingly I have written out a new preface, and am sending it to you. Please cut out the other one and glue this one on.[4]

Such a collection of prefaces for forensic speeches has been transmitted under the name of Demosthenes. The following preface, based on speeches of Lysias, Andocides, and Isocrates, may be accepted as typical of the forensic *prooemium:*

You see the schemes and zeal of my adversaries; I need not enlarge on that subject. All who are acquainted with me are aware of my inexperience. I shall beg of you a favor both just and easy to grant, that you hear me without anger just as you have listened to my accuser. For the defendant even if you listen impartially is necessarily at a disadvantage. My accuser has composed his accusation at leisure and free from personal danger. It is only fair that you show more good will towards the defendant. On more than one occasion the authors of the most serious accusations have forthwith been proved guilty of deception with such a weight of evidence that you would much more willingly have punished the accuser than the accused. Often witnesses have been exposed as perjurers, but too late to benefit their victims. So, since such things have happened, it is fair not to put confidence in the words

[4] Shuchburgh's translation.

of my accusers until I have replied to them. Whether the charge against me is serious or not you can learn from the speech of my accuser but whether it is true or false you can not determine until you have heard my defense as well. I hear it said, and you doubtless know it too, that the most terrible of all evils is calumny. I beg you to hear my defense with good will. Far from adopting the attitude of my adversaries toward me, suspecting my words and disregarding everything I say, hear me to the end. And then only reach the verdict which appears to you best and most in accordance with your oath.[5]

The leading orators and speech-writers exhibited great ingenuity in varying the phraseology and form of these commonplaces so as to make them appear natural and spontaneous. But no doubt both jurors and court habitués like modern readers rarely failed to recognize the trite and well-worn themes. The practice of appropriating in whole or in part the published *prooemia* of distinguished orators is cleverly satirized by Lucian, the famous humorist of the second century A.D. Zeus is represented as being on the point of addressing an important meeting of the gods.

Now is the time [says Hermes] for your speech: see they are hanging on your lips.

Why there is something wrong with me, Hermes my boy. I will be frank with you. You know how confident and impressive I always was as a public speaker.

Yes, I know.

But today, my child—it may be this terrible crisis—it may be the size of the audience—anyhow, my thoughts are all mixed. I shiver, my tongue seems tied. What is most absurd of all, my exordium is gone clean out of my head; and I had prepared it on purpose to produce a good impression on the start.

[5] Translated from Navarre, *La Rhétorique Grecque avant Aristote.*

You have spoiled everything, Zeus. They cannot make out your silence.

What think you I should do? Reel off the exordium in Homer? Which one?

"Lend me your ears, Gods all and Goddesses."

Rubbish. You made quite an exhibition of yourself in our cabinet council. However you might if you like adapt one of Demosthenes' Philippics with a few alterations. That is the fashionable method of speakers nowadays.

Ah, that is a royal road to eloquence—simplifies matters very much for a man in difficulties.[6]

Commonplaces appear elsewhere in the speech as well as in the *prooemium* though much less frequently. The following are familiar topics: the majesty of the law, the sanctity of oaths, the preservation of democratic institutions, the seriousness of making a mistake in capital cases, the importance to the community of punishing homicide, the reliability or unreliability of slaves' statements extracted under torture.

The memorizing of passages from the poets was an important feature of Athenian elementary education. The selections were made with a view to imparting moral lessons rather than improving the literary taste of the students. The Sophists made a different use of the poets with which their pupils had some familiarity to begin with. Selecting a particular passage the teacher would proceed to criticize the language, style, or subject matter. The students were expected to join in the discussion. In this way they acquired facility of expression. "I am of the opinion, Socrates," says Protagoras in the Platonic dialogue that bears his name, "that skill in po-

[6] Fowler's translation.

etry is the principal part of education: and this I conceive to be the power of knowing what compositions of the poets are correct, and what are not, and how they are to be distinguished, and of explaining when asked, the reason for the difference." Plato is doubtless following the practice of the schools when he introduces into a dialogue the discussion of a poem. It is to be observed that the participants are always thoroughly familiar with the selection discussed.

Discussions based upon the poets were more or less informal, but there was ample provision for more formal arguments, disputations, and debates of all kinds suitable for the needs of those who wished to fit themselves for the activities of the assembly or the law courts. Beginning with dialectic intended to discover truth they soon degenerated into eristic intended merely to win a victory. Hence arose the popular belief reflected in the *Clouds* of Aristophanes that these teachers of rhetoric were able "to make the worse appear the better reason and to argue down all justice." Topics were set for debate which afforded ready arguments on both sides for the purpose of training students to take either side of a case just as college debating teams are now taught to do. This was particularly valuable training for the youthful aspirant for forensic honors whose success depended largely on his ability to anticipate his opponent's arguments. Remarkable ingenuity was displayed in treating paradoxical themes. There are extant four pairs of speeches devoted to proving alternately that Good and Evil, Honor and Disgrace, Truth and Falsehood, and Justice and Injustice are both the same and different.

Other topics of this type are: "Is It Better to Suffer Wrong than to Inflict It?" "Is Expediency Preferable to Justice?" "Ought a Son to Obey His Father Rather than a Wise Man?" A common variety of exercise was a speech in accusation or defense of some mythical or historical character. Helen of Troy was apparently a great favorite in the schools. In addition to the defense of her attributed to Gorgias there is extant an encomium composed by Isocrates. They were models for the use of students. Isocrates also composed a defense of Busiris, a mythical king of Egypt, as an improvement on the performance of Polycrates. Odysseus, too, was a favorite. Alcidamas wrote a speech in which Odysseus is represented as charging Palamedes with treason, and a defense of Palamedes was composed by Gorgias.

Opportunities for more practical exercises were afforded. It was a common practice among the ancients to intrust to friends in whom they had confidence sums of money for safekeeping. The deposit theme in various forms was a familiar exercise. Isocrates has a speech on the subject to which Antisthenes published an answer. A novel form of the topic appears in an Egyptian papyrus published in 1898. A man made a deposit with a friend. Together they buried it in a field belonging to the friend. Afterward the depositor was discovered removing the money and was charged with larceny. A number of arguments on both sides are suggested. It is likely that the student was expected to work up these suggestions into two formal speeches. The contest for the arms of Achilles was a favorite subject for forensic speeches. Orations suited for the chief contestants, Ajax and Odysseus,

were composed and published by Antisthenes as models for students. But the most elaborate and practical models of forensic speeches on both sides are the Tetralogies of Antiphon, so called because there are two pairs of speeches in each case. One tetralogy deals with the death of a boy who was accidentally slain by a javelin-thrower practicing in the gymnasium. According to the Greek view, the shedding of blood entailed pollution; so it was necessary to determine who was responsible for a violent death even if it was accidental. Apparently the case was based upon facts, for Plutarch relates that a

> young man having unawares and against his will killed a spectator at some public games, Pericles spent a whole day with his friend Protagoras in a serious dispute, whether the javelin or the man who threw it or the masters of the games who appointed these sports were according to the strictest and best reason, to be accounted the cause of this mischance.

In his argument Antiphon omits the possibility of official responsibility because the accident is represented as taking place not at a public exhibition but in a gymnasium, but he adds a more difficult complication by suggesting that the deceased was himself responsible for his own death. These model orations of Antiphon are practical and much nearer to real forensic speeches than the exercises of the Sophists. The explanation is that Antiphon was a practicing lawyer and consequently in closer touch with realities than the theorists of the schools.

The practical value of the ability to argue on both sides of a case is shown in the experience of Xenophon, a product of the new education. After the death of Cyrus, the famous Ten Thousand who had no quarrel with

the great king accepted his offer of safe conduct back to Ionia. But suspicion of the good faith of the officer charged with the task of carrying out the treaty arose and a deputation of soldiers protested to Clearchus against the policy of trusting the royal oaths any longer. Clearchus replied by pointing out that in view of the physical and military difficulties there was no possible alternative.

You see that in the event of being driven to an engagement, we have no cavalry to help us, but with the enemy it is the reverse. Not only the most, but the best of their troops are cavalry, so that if we are victorious we shall kill no one, but if we are defeated, not a man of us can escape.

This view was perfectly sound as Xenophon well knew, but within a few weeks the situation changed; the king had seized and slain Clearchus and four other generals, and the Greeks had either to cut their way to the sea or surrender at discretion. Xenophon was elected general in place of his friend Proxenus and found it desirable to minimize the lack of cavalry which Clearchus had emphasized.

If any one of you is out of heart to think that we have no cavalry, while the enemy have many squadrons to command, lay to heart this doctrine that ten thousand horse equal only the ten thousand men upon their backs, neither more nor less. Did anyone ever die in battle from the bite or kick of a horse? It is the men who do whatever is done in battle. In fact we on our stout shanks are better mounted than those cavalry fellows: there they hang on their horses in mortal dread not only of us but of falling off: while we, well planted on the ground, can deal far heavier blows than our assailants and aim more steadily at whom we will. There is one point, I admit, in which their cavalry have the advantage: it is safer for them than it is for us to run away.

Xenophon was well aware of the fallacy of these arguments, and within a few days he proceeded to organize a small body of cavalry. But for the moment his humorous speech served the purpose of encouraging the Greeks to defy the king and face the odds against them. And so the familiar exercises of the Sophistic schools did good service in the hands of a war correspondent suddenly thrust into the leadership of a discouraged band of adventurers.

It was not difficult to interest young men in these exercises. Plato remarks in the *Republic:*

> You have observed that when young men get a taste of discussion they argue for amusement and are always contradicting and refuting others in imitation of those who refute them. They are like puppy dogs who delight to pull and tear at all who come near them.

In the *Apology* Socrates complains that he incurred the ill will of many of the citizens because the youths who constantly accompanied him in his quest for a man wiser than himself frequently made investigations on their own account to the great discomfort and annoyance of their elders. "These young men find, I fancy, a large number of men who think they are wise though they really know little or nothing. The victims thus publicly exposed are angry not at themselves but at me and assert that I am corrupting the young." Xenophon, in his *Memoirs of Socrates,* records just such a cross-examination as Socrates has in mind. The youthful Alcibiades one day said to his uncle:

> Pericles, could you give me a definition of law?
> Undoubtedly [replied Pericles] for your question is not at all

a difficult one. Those are laws which the majority in assembly approve and enact.

But if under an oligarchic government the minority and not the majority legislate, are their enactments laws?

All enactments of the ruling element of the city are laws.

And if a tyrant governs a city are the regulations which he publishes laws too?

Yes the enactments of a tyrant are called laws.

And what are violence and lawlessness, Pericles? Is it not when the stronger forces the weaker to do his will without consulting him?

Yes I think so.

Then is it lawlessness when a tyrant constrains the citizens?

It would seem so. For I take back my statement that the regulations of a tyrant are laws.

What then are we to say about the enactments of the minority who coerce the majority?

Whenever anyone forces another to do something against his will whether under the guise of legislation or otherwise, it is violence, not law.

Then when the masses legislate without the consent of the moneyed classes, would that be law or violence?

Alcibiades, when I was your age I used to be clever at that sort of thing, for in our debates we used to practice these subtleties which you are now trying on me.

Well, Pericles, I wish I had known you when you were at your best.

These products of the Sophistic schools were accustomed to frequent the market place where they eagerly discussed in stilted language the noted forensic triumphs of the day. In the *Knights* Aristophanes caricatures one of these meetings.

I refer to those young chaps who congregate in the drug-stores and talk like this. Phaeax is clever on the defensive. He won out all right and escaped the death penalty. Coercive speak-

er; most conclusive speaker; effective, argumentative, incisive and superlatively repressive of excessive noise and tumult.

Phaeax is affectedly described by a number of epithets ending in -ικος which the translation reproduces as far as possible by words ending in "-ive." The use of this ending was doubtless one of the many passing linguistic fads of these babblers of the market place. In another passage Aristophanes pictures one of these youngsters in the pride of a petty forensic success.

Do you think I don't know your kind? There are plenty like you. You start a two-penny half-penny suit against some foreigner or hyphenate. You refrain from wine; you con your speech by night and practice as you walk the streets; you recite choice passages to your friends to their disgust. Then when you win you think you are an orator.

Nevertheless, these fledgling orators were dangerous opponents when pitted against an untrained and inexperienced litigant. Aristophanes has an amusing and, at the same time, pathetic picture of an old man who had fallen victim to a youthful expert who had learned "evasion of a suit, persuasive counter-argument and summons," as Strepsiades in the *Clouds* of Aristophanes wished his son to be taught. The old man belonged to an earlier generation when, as Aristophanes puts it, "'Twas not our manhood's test, 'Who can make a fine oration? Who is shrewd in litigation?' It was, 'Who can row the best?'" Here is the old man's complaint:

We the veterans blame the city. Is it meet and right that we
Who of old in manhood's vigor fought your battles on the sea,
Should in age be left untended, yea exposed to shame and ill?
Is it right to let the youngsters air their pet forensic skill?

Grappling us with writs and warrants, holding up our age to scorn?
We who now have lost our music, feeble nothings, dull, forlorn.
There we stand decayed and muttering, hard beside the court house stone,
Nought discerning all around us save the darkness of our case.
Comes the youngster who has compassed for himself the accuser's place,
Slings his tight and nipping phrases, tackling us with legal scraps,
Pulls us up and cross-examines setting little legal traps,
Rends and rattles old Methuselah [Tithonus] till the man is dazed and blind
Till with toothless gums he mumbles, then departs condemned and fined.
Sobbing weeping as he passes to his friends he murmurs low,
"All I've saved to buy a coffin now to pay the fine must go."

Further complaints in similar vein follow. The verdict of the chorus is

For the future fines and exiles fair and square the balance hold.
Let the youngster sue the youngster and the old man sue the old.

The cynical protagonist of the new education in Aristophanes' *Clouds* strongly emphasizes the advantages of knowing how to speak.

You depart from the path of rectitude; you engage in an intrigue; you are caught. Then you are undone because you do not know how to speak. But if you take lessons from me you may go the limit, laugh, be merry, deem nothing base. Then if you are haled into court as a co-respondent plead that you have done no wrong. Cite Zeus as your example. He, too, was a slave to love and beauty. And could you, a mortal, be superior to a God?

So also in the *Republic* of Plato one of the qualifications of the super-villain whom Glaucon portrays to demonstrate his thesis that injustice is better than justice is

"ability to speak with effect if any of his evil deeds come to light." In the *Gorgias,* a dialogue devoted in part to the criticism of rhetoric, Callicles, one of the champions of rhetoric, advises Socrates to give up the pursuit of philosophy because a philosopher is ignorant of all those things which a gentleman should know.

> Why Socrates, you could not plead your case in a court of law nor furnish probability nor proof nor offer valiant counsel in another's behalf. If someone were to hale you off to prison declaring that you had done wrong, though you were innocent you must admit you would not know what to do. There you would stand giddy and gaping unable to say a word. And when you appeared in court even if your accuser were a poor creature and a rascal you would be put to death if he chose to demand the death penalty.

For as Polus, another interlocutor in the same dialogue, himself the author of a popular treatise on rhetoric, claims: "Those skilled in public speaking like tyrants kill or despoil or exile whomsoever they will." A similar sentiment is voiced by a client of Antiphon. "Many a man 'ere this though he spoke the truth failed to convince and was undone because he was not a skillful speaker; while others winning credence for their falsehoods have been acquitted, though guilty, because they were clever speakers."

Athenian audiences took a keen delight in good oratory whether in the assembly or the law courts or the lecture halls of the Sophists. The language must be suited to the subject, the delivery pleasing, and the gestures appropriate. Their attitude toward oratory was much the same as our attitude toward orchestral music. An error was like a false note in music. Faulty diction

was particularly distasteful. Suidas, the lexicographer, tells a story that illustrates in an amusing way the hypersensitiveness of an Athenian audience in this regard. On one occasion the city was in sore need of funds. A banker of foreign extraction offered to advance the amount required on very favorable terms. In the course of his speech he used the wrong future of the verb "to lend"—a mistake comparable to a confusion of "shall" and "will" in English. Immediately there was an uproar in the assembly; they refused to consider the banker's attractive proposition until he apologized and improved his Greek. To the present generation, which constantly hears incorrect English from pulpit and platform without either protest or comment, the incident is incredible. The story may not be literally true but its currency is evidence of a widespread belief that such an incident was not impossible. The nearest modern parallel to the Athenian insistence upon linguistic purity were the protests that greeted a false quantity in a Latin quotation in the English House of Commons a generation or two ago. A classic instance is Burke's mispronunciation of "vectigal." Demosthenes, it is said, relying upon this characteristic of his fellow-citizens, once assured Aeschines that the Athenians believed him to be a hireling (μίσθωτός) and offered to prove it then and there. He asked the dicasts if they did not regard Aeschines as a hireling (μίσθωτος) of Macedonia, purposely misplacing the accent. Instantly in every part of the court men shouted back μισθωτός, correctly accented. This explanation of the incident which is found in the scholiast is not generally accepted by modern scholars. Pseudo-Plu-

tarch, however, in his life of Demosthenes relates a less dramatic but more credible story which illustrates the point quite as well. In the assembly on one occasion Demosthenes said Ἀσκλήπιος instead of Ἀσκληπιός. Members of the audience not only corrected him but protested when he tried to defend his mistake.

The importance of correct diction is shown by the fact that speakers actually criticized one another's style. Aeschines once quoted certain harsh and unpleasant figures of speech which Demosthenes had used. "How," he exclaimed to the audience, "how, men of iron, could you endure them?" Then turning to his rival he shouted: "What are these, knave? Metaphors or monsters?" On another occasion in criticizing a phrase of Demosthenes he remarked: "I remember the expression for the word he used was as odious as the man." So critical an audience surely dismayed the inexperienced speaker. Not infrequently they apologize for their linguistic shortcomings. Thus a client of Antiphon, who was a native of Mytilene, anticipating possible criticism says:

> My prayer is first, that if my tongue leads me into error, you will be merciful, and consider my error due to inexperience rather than guilt; and secondly, that if I should in any point express myself well, you will attribute such expression not to any cleverness of mine but to the inherent power of truth; for justice demands that any man guilty in his actions should not win acquittal by his speech, and, likewise that one righteous in his actions should not for his speech be brought to ruin; for an error in speech is the fault of the tongue, an error in action is the fault of the mind.

And Socrates asks the dicasts not to take offense if he discards the regular forensic style and uses his own homely speech. The tragic drama reflects to a surprising

degree the popularity of forensic oratory. In the *Eumenides* of Aeschylus which portrays the trial of Orestes before the Areopagus there are no long speeches. Arguments are stated and answered in short dialogue form. In Sophocles there are longer speeches in which commonplaces, general sentiments, and familiar maxims predominate in the manner perhaps of the older oratory. Euripides, however, though practically contemporary with Sophocles composed long balanced speeches that would have done credit to the best forensic orators of his day. There is no attempt to reproduce a forensic speech in all its parts though occasionally one recognizes the familiar commonplaces of the *prooemium*. "I have no skill to speak before a throng." "Never should this thing have been, that words with men should more avail than deeds." Unquestionably, Euripides is catering to the prevailing public taste in introducing so much oratory and argument into his dramas. "No contrast," remarks Jebb, "could be more significant than that between the singular barrenness of the trial scene in the *Eumenides* [of Aeschylus], or the measured controversies of the *Ajax* [of Sophocles], and the truly forensic subtleties of the *Orestes* [of Euripides]."

Comedy, on the other hand, shows little or no trace of the influence of contemporary oratory upon its form. The popular tendency to place form above content was soon recognized as inimical to wise counsel in the assemblies of the city, whether deliberative or judicial. In the same year that Gorgias made such a sensation in Athens with his oratory Cleon, the great demagogue, severely criticized this tendency. Cleon was himself a skilful

speaker who had at his command all the resources of rhetoric though he scandalized many good people by girding up his loins, striding up and down the platform, and roaring like Niagara, according to Aristophanes. In defending the harsh decree which condemned to death the adult male population of Mytilene he denounced in scathing language the general preoccupation with oratorical displays.

Misled by clever speakers the people make dangerous concessions to the subject states. The sophisticated members of the assembly ought rather to give good advice than to seek occasions for the display of eloquence and cleverness and become rivals in oratory for popular applause. In such rhetorical contests the city gives away the prizes to others while she takes the risk upon herself. And you are to blame for ordering these contests amiss. When speeches are to be heard you are too fond of using your eyes, but where actions are concerned you use your ears. You are slaves of each paradox and contemptuous of the familiar. Not a man of you but would be an orator if he could. In a word you are at the mercy of your ears and sit like spectators attending a performance of sophists rather than counsellors of state. Do not hold out a hope which eloquence can secure. . . . . Do not be misled either by pity or the charm of words. . . . . Our charming orators will have another occasion for display where the issues are not so serious.[7]

In spite of the great popular interest in oratory men were not slow, where their own interests were concerned, to distrust the art of rhetoric whose professors were popularly believed to boast that they could make the worse appear the better cause. The famous story of the lawsuit between Corax of Sicily and his pupil Tisias—a story told about at least two other teachers and their

[7] Thucydides (trans. by Jowett).

pupils—expresses not the real character of the earliest rhetoric so much as the popular conception of it as highly immoral. Corax undertook to instruct Tisias in oratory and agreed not to demand his fee until Tisias had won his first case. On finishing the course Tisias neither practiced the art nor paid the fee. Finally, Corax (i.e., Crow) sued him and argued that if Tisias won the suit he would be obliged to pay the fee according to the terms of the contract; if he lost he must pay by reason of the verdict of the court. "Not so," responded Tisias, "if I win, the verdict of the court frees me from all liability; neither do I have to pay if the verdict is against me, for according to the agreement the fee is not payable until I win a case." Utterly perplexed by the dilemma, the court dismissed the case with the comment, "Bad crow, bad egg." Contemporary literature reflects a similar attitude on the part of the intellectual classes toward the abuses of rhetoric and the unwarranted pretensions of its exponents. Socrates inquired in Plato's dialogue named after the famous Sicilian rhetorician:

> What is rhetoric, Gorgias?
>
> Rhetoric is the art of persuasion in courts and other assemblies about the just and the unjust [replied Gorgias].
>
> And what sort of persuasion does rhetoric produce in courts of law and other assemblies about the just and the unjust? Is it the sort of persuasion which gives belief without knowledge or that which gives knowledge?
>
> That which produces belief only.
>
> The rhetorician, then, need have no real knowledge; he has only to discover some way of persuading the ignorant that he has more knowledge than those who know [concluded Socrates].

To the same effect is a passage in the *Theaetetus* of Plato.

> Orators and lawyers persuade men by their art and make them think whatever they like, but they do not instruct them. Do you imagine that there are any teachers in the world so clever as to be able to convey to others the truth about acts of robbery and violence of which they were not eyewitnesses while a little water is flowing in the hour glass [*clepsydra*]?

A purely professional and superficial attitude of hostility toward forensic as distinguished from parliamentary and epideictic oratory is found in numerous passages in Isocrates' political and educational discourses. Here are a few of his animadversions:

> Athens alone is capable of supporting a numerous body of speech-writers. Elsewhere they would starve.
>
> Forensic speeches are a bore. They are tolerable only on the day of delivery.
>
> Other orators are welcome in all assemblies. Their oratory from a literary point of view is superior and audiences enjoy it as much as poetry.
>
> The pupils of those who teach the higher types of oratory, Hellenic, political and panegyric, do not lay informations and bring indictments and plot against the possessions of others.
>
> The clients of the speech-writers are those who are either themselves in trouble or are responsible for the troubles of others.

In the *Clouds,* presented in 423, Aristophanes protested vehemently against the education introduced by the Sophists with its emphasis upon rhetoric. The hero of the comedy is Strepsiades, an Athenian farmer who has become deeply involved in debt by his son's expensive tastes in horseflesh; he complains that he is unable to "sleep a wink, devoured by duns, expenditures, and stables. . . . . Some suits I've lost already and some

swear they are going to distrain. . . . . A galloping consumption has caught my fortunes. So now devising ways and means all night I've found a way, a marvellous transcendent way." He proposed to have his son taught the two arguments in the school of Socrates. "Of these two arguments the second, that is the worse, gains the victory though speaking on the unjust side. If you learn this unjust argument then all the debts I owe through you I'll never pay—no, not a single penny." The son refuses to go. Not to be balked in his plan Strepsiades himself goes, though not without misgivings. "How can I, forgetful, slow, and old, learn the nice hair-splittings of subtle logic?" He enters the school, however, and proclaims his desire to learn to speak. "Owing to my dunning creditors and the interest I'm robbed and plundered and my property is distrained. . . . . I want just enough training to avail myself of the twists in the law and to give my creditors the slip." The next scene is devoted to a ridiculous caricature of the Socratic method, and ends with an examination of the candidate for the Athenian bar. Here are some of the questions:

If a judgment for five talents were registered against you how would you evade it? Tell me that.

How? How I cannot tell.

Don't forever wrap your mind about yourself, but let your thought stray through the air like a beetle with a thread tied to its foot.

I have found a bright evasion of the judgment. You must yourself confess 'tis glorious. You've seen that stone in the drug-stores, that beautifully transparent stone with which they kindle fires, haven't you?

You mean the burning glass?

That's it. What would you say if I should get one of these and when the clerk enters the judgment I should stand some distance off towards the sun and burn up every word of the judgment against me?

Clever scheme indeed.

Ah, how pleased I am to have a judgment for five talents struck out.

The next question is:

How as defendant would you rebut the case against you if you were sure to fail for want of witnesses?

Most simply and easily.

Tell me.

All right. Before the case ahead of mine on the docket was called I'd go and hang myself.

Absurd. Be off. I will not teach you any longer.

In despair over his failure Strepsiades makes another attempt to persuade his son to go and learn to ply his tongue. Phidippides consents. At first Socrates doubts his ability to learn "evasion of a suit, persuasive counter argument and summons." But Strepsiades insists that the boy be taught the two arguments, the just and the unjust. With a final injunction to Socrates to teach him to argue down all justice he departs. The two arguments are introduced and invited to present their cases to the boy. Then follows a detailed indictment and defense of the education of the day in contrast with the education in vogue in the previous generation. Emphasis is placed on the moral aspects of education by the one side, while the value of knowing how to speak is insisted upon by the other.

The young man decides in favor of the unjust argument. Strepsiades reappears and charges Socrates to

"teach and to flog him and remember to sharpen him well for me, on the one side fit for trivial suits, on the other fit for more important cases." The training of Phidippides is passed over in silence. When it is completed Strepsiades receives his son with joy. "O woe to you penny chasers, yourselves and your principal and your interest compounded. You will never annoy me again since I have reared such a son in my house blessed with a two-edged tongue, my house's protector, my enemies' terror." He is forthwith assailed by insistent creditors. These are dismissed in turn with promises, jests, subtleties, and blows. One creditor asks him to pay the interest at least.

Interest? What kind of beast is that?

Why, month by month and day by day as time sweeps on the silver ever becomes more and more.

Finely said, but do you think that the sea is larger now than it used to be?

It is the same as before.

And yet, you rascal, does it become no larger with all the rivers flowing in, while you desire to make your silver grow larger?

Having rid himself of his creditors, Strepsiades takes his son in to a feast.

In the next scene Strepsiades rushes out upon the stage holding his jaw and complaining that his son has beaten him. Phidippides follows him boldly proclaiming that he is justified in beating his father and offering to prove it to the latter's satisfaction. He lays down the thesis that it is right for sons to beat their fathers, and proceeds to "make the worse appear the better reason."

What a fine thing it is to deal with new and ingenious ideas and to be able to despise established conventions. When I used to play the races I couldn't utter three words without making a break. But since I've reformed and have become familiar with subtle arguments, maxims and meditations I fancy I'll convince you that it is right to chastise one's father. Did you not chastise me when I was a child?

Yes because of my good will and concern for you.

Well then, is it not right for me also to show my good will by beating you since according to you beating and good will are identical? Why should your body be free from blows and mine not? I too am free as well as you. Children howl. Don't you think that fathers should howl also? But you will say it is the custom for children to endure this. I respond that old men are twice children. It is more fitting that the old should howl than the young for there is less excuse for their faults.

But nowhere is it the law and custom for fathers to be treated so.

Well, was not the lawgiver a man like you and me who first laid it down and talked over the men of old? May I not also lay down a new law for the future that children should chastise their fathers in retaliation? Consider the roosters and other domestic animals. See how they punish their sires. And yet how do they differ from us except that they don't make laws?

Why then, if you ape the roosters, don't you scratch for a living in the barnyard and sleep on a perch?

But my dear sir, that's not the same thing.

Now don't beat me, otherwise some day you'll rue it.

How?

Because if I have the right to beat you, you in turn will have the right to beat your son if you have one.

But if I haven't a son, then I shall have howled in vain and you will die with the laugh on me.

To this Strepsiades has no reply, and turning to the audience sorrowfully admits that he is convinced. With

all its manifest absurdities and nonsense the *Clouds* portrays two types of citizen. Phidippides finds his counterpart in the youthful products of the new education who lounged in idleness about the market or lived by their wits at the expense of simple citizens like Strepsiades who had not learned to ply their tongues. Under these circumstances it occasions no surprise to learn from Isocrates that "there was no one who would not pray to heaven for the gift of eloquence."

CHAPTER IX

TACTICS AND TECHNICALITIES IN LITIGATION

The importance attached to rhetoric and argumentation in Athenian legal education tends to obscure other features quite as important, such as the interpretation of laws, the citation of cases, the employment of special pleas, the presentation of evidence, and all the tactics which a litigant who knew the game could employ to embarrass a less skilful opponent. And yet these and other equally essential features of litigation were undoubtedly taught in some fashion though they receive scant attention in the literature. Sophists like Euthydemus professed to teach a man how "to use the weapons of the courts when he is injured." And Strepsiades goes to the comic law school of Socrates in the *Clouds* of Aristophanes anxious to become a "walking statute book," and "to learn to twist the law so as to give his creditors the slip." And Hyperbolus, the notorious demagogue, we are told in the same comedy, learned "evasion of a suit and summons and persuasive counter argument." One of the questions put to Strepsiades after he had taken the course was: "If a judgment of five talents was registered against you how would you evade it?" This evidence from the comic stage that students sought to familiarize themselves with the twists and turns of litigation may be supplemented by a passage from Plato.

There is a further stage of the evil in which a man is not only a lifelong litigant passing his days always in the courts either as plaintiff or as defendant, but is led by bad taste to pride himself on this. He is ready to fancy that he is a master in cunning; and he will take every crooked turn and wiggle into and out of every hole bending like a withy and getting away."

Athenian laws were published by being inscribed on wood or marble in the royal portico where the King Archon had his office, and by being filed in the Metroon where they were accessible to all citizens.[1] The elaborate system of legislation with its ample provision for written and oral publication of all proposed laws and amendments and the participation of so many citizens in the annual court of revision insured abundant publicity for all new legislation that was adopted. Furthermore, in the administration of justice so many participated as arbitrators, magistrates, dicasts, or parties, not to mention spectators, that the average citizen must have been much more familiar with laws than the citizen of a modern community who is presumed to know the law of the land, and who can not escape punishment by pleading ignorance of any particular law: *Ignorantia legis non excusat.* But whatever familiarity with law Athenians may have acquired in these casual ways the knowledge could not be adequate for those involved in litigation either personally or professionally. Of systematic instruction in the law of the land little or nothing is said in the literature. A knowledge of the law on the part of the students is assumed in disquisitions on the subject. There may very well have been collections of laws and decrees suitably arranged for study and reference. But

[1] Weiss, *Griechisches Privatrecht,* pp. 34 ff.

there is no record of such collections until towards the end of the fourth century when Aristotle had set the fashion of collecting material of all sorts for scientific purposes. In citing a law the speaker either gave it in his own words or had a copy read by the clerk. Antiphon, however, never puts in a copy. He either assumes a knowledge of the law on the part of the jury or refers in a very general way to some of its provisions. There is no indication that copies of laws produced in court were official. In fact, comparisons with extant fragments of laws would seem to indicate that a litigant allowed himself considerable latitude in the way of omissions and transpositions. It was sufficient if the quotation was not materially different from the original. Actual falsification of a law was severely punished.

Aristotle suggests several ways of dealing with adverse laws.

> If the written law be opposed to his case the litigant must appeal to the universal law as Antigone did when she disobeyed Creon's order not to bury her brother's body in obedience to the universal law that requires relatives to bury their dead with proper funeral rites. Again if the letter of the law is adverse one may appeal to its spirit or to equity as being superior to law.

As an example he imagines a case where one might be arraigned under a law providing severe punishment for striking another with an iron instrument because the accused was wearing an iron ring when he delivered the blow. "By the written law [the letter of the law] he is liable to the penalty and has committed a crime but in truth and in fact he is not guilty of a crime, and herein lies equity."

The interpretation of statutes is an important feature of modern litigation. Once a law is interpreted by a court of last resort the interpretation is binding in all subsequent cases. But in Athens each court was supreme and could interpret and apply laws as it saw fit. One might imagine that such a situation would encourage litigants to try to twist the law to their own advantage by ingenious interpretations, as Aristotle suggests. "The litigant should observe if the law that stands in his way be at variance with any approved law or be at variance with itself. . . . . Let him observe also whether it be equivocal so that he may wrest it to his purpose." Later rhetoricians have many illustrations of contradictory and equivocal laws. One law provides that if a son is legally disowned he may not inherit any of his father's property. According to another law the man who remains on board a ship that is cast away gets the cargo. What would happen if the man who stood by the ship was the disowned son of the owner? A law forbade harlots to wear jewels on pain of being confiscated (*δημοσια*) But what is to be confiscated? The woman or the jewels? A harlot is arrested and the prosecutor accenting the word *δημοσία* ("confiscated") on the penult claims that it refers to the woman and demands that she be sold, but the woman accenting the word on the antepenult (*δημόσια*) claims that it refers to the jewels only.[2]

It would seem that the conflict of a law with itself, with other laws, with universal law, and with equity received considerable attention in the schools as topics for ingenious arguments rather than as exercises in the in-

[2] Greek was written without accents up to the second century B.C.

terpretation of laws. On the whole, there are in the extant speeches comparatively few examples of such discussions as Aristotle recommends. Litigants were reluctant to appear expert in the laws lest they incur the suspicion of being sycophants; they desired to appear as plain men in no wise superior to their auditors. In fact, a litigant sometimes apologizes for his familiarity with the intricacies of the law. Circumstances over which he had no control obliged him to acquire expert knowledge of the law that applied to his case. One of Lysias' clients meets in a most amusing manner the contentions of an opponent who insisted upon a literal interpretation of a word in the law regarding slander that would have done credit to the most ingenious of the rhetoricians of the schools. The plaintiff sued a certain Theomnestus for slander, claiming that he had said of him that "he had killed his own father." Before the arbitrator, it appears, Theomnestus admitted that he had used the expression, but pleaded that the words "killed his father" were not actionable because the law merely forbade anyone to call another a "homicide." It seems incredible that such a plea could be made anywhere outside the debates of the schools. But many an indictment has been thrown out of British and American courts for less.[3] At

[3] In an English case of 1608 the defamatory words were: "Sir Thomas Holt struck his cook on the head with a cleaver and cleaved his head; the one part lay on the one shoulder and the other on the other." It was moved in arrest of judgment that these words were not actionable because it was not averred that the cook was killed. The court upheld this view and dismissed the case (Holdsworth, *History of English Law*, VIII, 360).

any rate, the arbitrator decided in favor of Theomnestus, and the plaintiff appealed. Resolving to take no chances this time he devoted nearly half of his speech to the point. He began by expressing his confidence that the jurors are concerned not about words but about their signification. He says:

> A homicide is one who has slain someone, and whoever slays another is a homicide as you all know. It is too much to expect the lawgiver to give all the equivalents of this and other actionable words. You, Theomnestus, would not, I imagine, think of prosecuting a man for calling you a "parricide," an actionable word, and take no action against one who said you "slew the author of your being." And I should like to know if you who are well qualified to express an opinion on this point would pay no attention if someone said you "cast away your shield" because the law says "throw" not "cast"? [This is a shrewd thrust, for the present case grew out of the impeachment of Theomnestus for throwing away his shield.] Would you if you were one of the Eleven dismiss the case against a man charged with "grabbing a cloak" because he was not described in the indictment as a "cloak snatcher"?

In this strain he proceeds for a page or more and ends by quoting sections of old statutes that contain obsolete words which he gravely explains to the defendant in the hope that "he may even at this late date supplement his education and cease giving people trouble." This case is without parallel in ordinary litigation. There are occasional comments on the meaning of a phrase in a law. For example, another client of Lysias explains that "wounding with intent" means "with intent to kill, not with intent to wound." Where, however, the interpretation of a law was in dispute as in cases of prosecution for illegal legislation, speakers did not hesitate to display

their erudition. Indeed, the men who specialized in these cases or appeared as advocates before courts of revision were as erudite and ingenious as any modern expert in constitutional law. Demosthenes' speech against Aristocrates contains a complete disquisition on the laws dealing with homicide which is an important source of information on the subject. In fact, it is a *locus classicus*. And in the speech against Timocrates no fewer than seventeen laws and decrees are read, analyzed, and discussed.

British and American lawyers must know not only the principles of the common law and the statutes in force in their jurisdictions, but they must be more or less familiar with cases in which the law has been authoritatively interpreted and applied. The law is found not only in the statutes but also in the decisions of courts of final resort. But Athenian tribunals were not bound by precedent.[4] Consequently, the Athenian student of the law was largely absolved from the heavy burden of familiarizing himself with case law. But he was not entirely absolved, for no group of judges could fail to be impressed by a precedent, even if they were at liberty to disregard it freely. Aristotle recommends the citation of cases likely to be familiar to the dicasts. In the extant speeches cases are not infrequently cited. The plaintiff in *Ariston* v. *Conon,* a client of Demosthenes, charged the defendant with responsibility for assault because he had been

[4] "In most continental countries the decisions of the courts are referred to and used in argument or discussion, though the courts are distinctly not bound to follow previous decisions" (Pollock, *A First Book of Jurisprudence,* p. 240).

present at a murderous attack made by his sons, though he had not participated in it. He cited the case of the father of a priestess of Brauron who had been banished by the Areopagus for inciting to murder. Antiphon mentions several instances to show the danger of condemning men on insufficient evidence. Demosthenes alludes to several cases recent enough for all to remember to prove that the courts could reverse the decisions of the assembly in regard to naturalization. And Isocrates adduced the case of a citizen who successfully relied upon the amnesty of 403 B.C. when charged with malversation on an embassy. But nowhere is there so near an approach to the discussion of precedents in a modern court as in *Demosthenes* v. *Meidias*. It is, in fact, the exception that proves the rule. Demosthenes anticipated that the defendant would bring forward a number of instances of persons who had committed similar assaults without being punished. He selects two and proceeds to differentiate them from the present case by pointing out extenuating circumstances. Several other cases are cited to show how careful the Athenians were to punish even trivial offenses at the time of the Dionysia. A certain Ctesias was put to death for striking a personal enemy in the procession; another, narrowly escaping the death penalty, was heavily fined for arresting a judgment debtor during the celebration of the Mysteries. Many of the cases cited in an Athenian court would not be available before modern tribunals because they merely show the policy of the courts and trend of public opinion. The effect of Athenian precedents was not legal but

psychological. Opponents were quick to see the advisability of nullifying the effect of these precedents. "The defendant," says Aeschines on one occasion, "if he ever refers to the facts at all, tells you not that his proposal was legal but that somebody else had proposed similar measures before his time and had been acquitted."[5]

There is no indication that official records were consulted for cases. In a city like Athens where so many people were involved in litigation there would be no difficulty in finding suitable precedents among recent cases. The memories of relatives, friends, and acquaintances were at the litigant's service; he had no need to consult the official records. "Someone," says Demosthenes in his speech against Meidias, "told me he [Meidias] was going about collecting cases, and inquiring what people had ever been assaulted, and that he intended to bring those cases forward, and give you the histories of them."

The rules of evidence developed by English common law for the purpose of securing the best available testimony are very elaborate. Much skill and acumen are exhibited by British and American lawyers in examining and cross-examining witnesses, and the frequent disputes between rival lawyers regarding the admissibility of this or that bit of testimony tend to enliven court proceedings otherwise dull and uninteresting to the spectator. These features were entirely lacking in the Athenian system. In the earlier stages of the administration of justice in Greece as elsewhere little or no effort was

[5] Dobson, *The Greek Orators,* p. 185.

made to confirm the statements of the parties by parole or documentary evidence.[6] In place of evidence tests of veracity were devised. Familiar examples are trial by ordeal or the evidentiary oath of the principal alone or in conjunction with oath-helpers who swore that his oath was good. Occasionally a resourceful judge devised novel tests. Thus the famous judgment of Solomon was a test of veracity rather than a gruesome compromise. Even in fifth- and fourth-century Athenian trials the evidence was meager in comparison with modern requirements. The reading of the affidavits and other documents presented in an Athenian court would give one a very inadequate notion of the matter at issue; but the careful perusal of the evidence in a British or American case would put the reader in full possession of the facts. Such testimonial evidence as was produced in an Athenian court was never subject to cross-examination. In the fourth century its value was still further impaired by the substitution of affidavits for oral testimony. A witness may often be induced to subscribe to a statement in writing that could not be drawn from him by questions in open court. The nearest approach to modern testimonial evidence is the examination of a party in court by his opponent. A party to a suit could not be a witness in his own behalf, but he was obliged to answer questions of his opponent during the progress of the trial. Only a few of these interrogatories have been preserved; but apparently they were common enough in

[6] For a detailed discussion of evidence the reader is referred to Bonner, *Evidence in Athenian Courts*. Chicago: University of Chicago Press.

the fifth century. In the *Acharnians* of Aristophanes an old man complains that he and others like him fall easy victims in litigation to young men skilled in the new art of rhetoric who "called them up and cross-examined, setting little verbal traps." For the expert this was a valuable privilege. In the hands of Socrates his chief accuser, Meletus, makes damaging admissions as reported by Plato in his version of the defense. All the books on rhetoric paid some attention to interrogatories; but the ordinary litigant found the privilege of little value, particularly if he purchased his speech. The speech-writer could outline an interrogation only in those cases where the answers could be anticipated with reasonable certainty. Such admissions were of slight value, besides there was always the danger that the party questioned would boldly resort to falsehood especially as he was not under oath. This would be a serious rebuff even if evidence could be introduced to show that the answers were false. In the recorded examinations no information of value is extracted. Thus the grain-dealers charged with profiteering by one of Lysias' clients freely admitted the charge, but claimed they had official sanction for what they did. For these reasons the practice gradually fell into disuse so far as the speech-writers were concerned, though men who were capable of conducting their own cases doubtless continued to avail themselves of the privilege if they possessed any skill in cross-examination.

Apart from the rules of competency excluding the testimony of women, children, slaves, and parties to the case, the chief rule of evidence was that forbidding hear-

say evidence on the ground of the general untrustworthiness of reported statements. But there were a number of exceptions that an aspirant for forensic success must know. A general exception was recognized when the original witness was dead. This exception included ante-mortem statements, and declarations of deceased persons about pedigree and matters of family history. In English law, entries in the books of a deceased person made in the course of business are treated as written hearsay evidence. The same was true in Athens. The most common examples in the orators are the papers of deceased bankers.

Under certain circumstances hearsay evidence was admissible even when the original witness was still alive. If a person could not be produced as a witness either by reason of his incompetency or his unwillingness to testify, his statement could be put before the court by means of the testimony of anyone who had heard it. A party to a suit though not technically a competent witness could, as has been noted, be questioned in court, but it was permissible also to get his admissions before the court by means of the testimony of a person in whose presence the admission was made. For the inexperienced litigant this was much safer than a direct examination before the dicasts. A person summoned to appear as a witness might refuse to testify on the ground that he had no knowledge of the matter. Where the refusal was really due to bribery, or interest in the case rather than ignorance of the facts, it was the practice to introduce if possible evidence of admissions which were at variance with his statement in court.

Closely connected with hearsay evidence is what may conveniently be called "extra-judicial depositions." The testimony of persons who were beyond the jurisdiction of the court or were too ill to attend could be reduced to writing in the presence of witnesses who afterwards by an attesting affidavit identified it in court. The orators sometimes confuse this with hearsay evidence, but the fact that both the deposing and the attesting witness were liable for perjury clearly differentiates extra-judicial depositions from hearsay evidence. In hearsay evidence the person who reported a statement was liable but not the person who made it.

It was desirable but not necessary that everything should be confirmed by evidence. Consequently, the speech of an Athenian litigant differs fundamentally from that of a modern lawyer in that it contains much matter that could be brought before a modern tribunal only in the form of evidence. The dicasts were at liberty to base their verdict on the unconfirmed statements of a speaker if they deemed them trustworthy, or upon their own independent knowledge of the case. The proceedings in an Athenian court were so informal that the judges did not hesitate to communicate with their neighbors during the progress of the trial. In fact, speakers frequently urge them to tell the others what they themselves know regarding any particular phase of the case. Not infrequently confirmation is promised but never produced. It is also charged that speakers trick the judges by claiming falsely that certain matters are familiar to many of them.

Challenges played an important rôle in the strategy

of litigation. As women and slaves were not competent witnesses their evidence was not available except by consent. If a speaker believed that his opponent's slaves were aware of matters that supported his contentions, he challenged him to surrender them for question under torture. Or he could offer to surrender his own slaves for examination. In either case there was a binding agreement that the answers of the slaves should be final and settle that phase of the case. Similarly, the evidentiary oath of a woman might be offered or demanded with the understanding that her statement under oath would be final. Accordingly, if a challenge was accepted it might settle the entire issue without further proceedings. As a matter of practice challenges seem to have been rarely accepted. A rejected challenge enabled a speaker to set forth without corroboration all that he claimed could have been proved by the woman, the slave, or the document withheld. A further advantage of a rejected challenge was the shifting of the burden of proof. The opponent was at once put on the defensive. A counter challenge was the best means of neutralizing the effects of a rejected challenge.

Many of the most objectionable technicalities of the English criminal procedure were due to the efforts of judges in a more enlightened age to protect criminals from the extreme harshness of the old criminal law which denied the accused what are now regarded as the most elementary rights. The more humane judges of the eighteenth century began to insist on a rigid compliance with all the requirements of the law on the part of the crown prosecutors. For example, the slightest error was

held to invalidate an indictment.[7] When finally legislation accorded more liberal treatment to the accused the old technicalities, further multiplied by the ingenuity of criminal lawyers, were no longer needed, and most of them were abolished in the nineteenth century. In some of the common-law states of the Union no similar statutes have been passed, so that many antiquated technicalities of which the layman is justly suspicious still survive. Athenian procedure is entirely free from this type of technicality. The Athenian layman who sat in judgment wished the whole case to be threshed out in a single sitting. Any attempt on the part of the defendant to delay the hearing or limit it to a particular aspect of the case exposed him to the suspicion of resorting to a mere trick to avoid payment or punishment which an innocent man would not employ. Plaintiffs and prosecutors were only too ready to encourage this suspicion by criticizing roundly their opponents who for any reason whatsoever were reluctant to submit the entire case to trial at once. Here are the introductory words of a speech of Demosthenes against one Lacritus, a merchant of Phaselis, who in answer to a claim by an Athenian money-lender demurred that there was no contractual relationship between himself and the plaintiff.

The Phaselites are doing nothing new, men of Athens, only what they are in the habit of doing. They are famous people for borrowing money on your exchange, but when they have got it and have drawn up a maritime contract they immediately forget their contract and the laws, and consider that if they pay their debt it is

[7] Dillon, *The Laws and Jurisprudence of England and America,* pp. 368–69; Kenny, *Outlines of Criminal Law,* p. 538, n. 4.

like losing something of their own, and, instead of paying, they resort to sharp practices, special pleas, and excuses.

This is mere denunciation. To the same effect is an extract from another speech attributed to Demosthenes:

Of all methods of trial this by exceptive affidavit [special plea] is the most unjust, and the parties who resort to it are most deserving of your displeasure, as you will clearly see by what I am about to say. In the first place it is not necessary as other processes are. It takes place only by the choice and desire of the party who swears the affidavit. If there is no other way of getting judgment upon disputed claims unless you swear an affidavit of this sort perhaps it is necessary to swear one. But if it is possible to obtain a hearing before all tribunals without an exceptive affidavit is not such a step a mark of recklessness and complete desperation? The legislator did not make it obligatory upon the contending parties: he allowed them to put in an exceptive affidavit if they pleased, as if he were putting our several characters to proof to see how far we are inclined to reckless courses of action. Observe also: if parties putting in these special pleas had their way there would be neither courts of justice nor causes for them to try: for it is of the very essence of exceptive affidavits to put a stop to all proceedings and to prevent questions being brought before the court: such at least is the intention of the parties who swear them. Therefore I consider that such persons should be regarded as the common enemies of all.

A similar attack had to be answered by the banker Phormio, who was sued by his notorious stepson, Apollodorus on an old claim arising out of his administration of the estate of Pasion, the father of Apollodorus. In answer he pleaded not only that the claim had been satisfied but that it was outlawed.

You hear, men of Athens, the law mentioning among other matters for which there shall be no right of action those of which

a man has given a release or discharge. And with reason, for if it is just that men shall not bring fresh actions for causes that have once been tried it is far juster that there shall be no action for claims which have been released. For a man who has lost his cause by your verdict may possibly say that you were deceived, but when a man has plainly decided against himself and given a release and discharge what complaint can he prefer against himself to entitle him to sue over again for the same matter? None surely. Therefore the framer of the statute among the cases in which there is to be no right of action first mentions those in which a man has given a release and a discharge. . . . . Now please take the statute of limitations. You are bound to pay attention to all laws, but especially to this, men of Athens. For Solon as it seems to me framed it for no other purpose but to prevent your being harassed with false claims. He considered that five years was a sufficient time for the injured parties to recover what was due them: and he thought that length of time would be the plainest proof against those who came with false stories. And knowing also that it was impossible for the contracting parties and their witnesses to live for ever he put the law in their place that it might be witness of the truth in favor of the destitute.

If any jurymen were inclined on general principles to be suspicious of special pleas they must indeed have been very unreasonable if they refused to be convinced by so sensible an argument. It puts the philosophy of a statute of limitations in a nutshell. On the whole, the Athenians must have been persuaded that special pleas were under certain conditions perfectly legitimate and proper, otherwise they would not have extended to other cases a procedure originally intended to deal only with infractions of the amnesty after the overthrow of the Thirty Tyrants by allowing a person haled into court to speak first and to show that regardless of whether he was liable or not the proceeding was contrary to the

provisions of the amnesty. Indiscriminate use of special pleas was discouraged by the imposition of a fine of one-sixth of the claim if the defendant failed to obtain at least one-fifth of the votes. The plaintiff also was liable to the same fine in case he failed to obtain one-fifth of the votes. The purpose of this unique provision was at the same time to discourage both the bringing of suits that could be thrown out on technical grounds and the resort to special pleas. But in spite of the suspicious attitude of the jury and the danger of incurring a fine the special plea was attractive because it reversed the rôle of plaintiff and defendant and enabled the latter to get the ear of the court first. In the case of *Apollodorus* v. *Phormio,* mentioned above, the plaintiff claimed that after hearing Phormio, who filed a special plea, the jury refused to listen to him. It is impossible to determine to what extent the resort to special pleas was actually discouraged. A client of Demosthenes ostentatiously refused to avail himself of his right to enter a special plea.

> Now take the law which enacts that guaranties shall be in force for one year. I don't insist that under the statute I ought not to pay damages if I became surety. But I say that the statute is my witness that I never became surety, and so is the plaintiff himself. For otherwise he would have sued me on the guaranty in the time specified by law [i.e., within one year of the default of the principal].

Another suitor attributed his failure to win a case to the jury's dislike of technicalities. "I did not put in a special plea or make an affidavit for delay, such proceedings having once damaged me in a former suit." But even when a litigant resorted to a demurrer or spe-

cial plea he did not confine himself to the technical argument but proceeded to bring in his evidence and to argue the case on its merits. In this way he secured the chief advantage of the special plea, the right to speak first, and escaped the disadvantage of appearing to rest his case entirely on a technicality.

In the Athenian system a choice of remedies for a particular grievance was often available. Demosthenes says:

> Solon provided not one but many ways of proceeding against wrongdoers. . . . . Take theft for example. Are you able-bodied and confident in yourself? Take the thief to prison: but you risk the penalty of a thousand drachmas.[8] Are you not strong? Take the magistrates with you: they will do it. Are you afraid of this too? Indict him. Do you distrust yourself and are you too poor to pay a thousand drachmas? Sue him for larceny before the arbitrator, and you will run no risk. None of these courses is the same. For impiety in like manner you may take to prison, indict, sue before the Eumolpids, or lay information before the king. And in all other cases the situation is much the same.

In determining what kind of action was best suited to redress his grievance a litigant must exercise considerable care. An opponent was quick to make capital out of any false or unwise step. When Demosthenes undertook for his tribe the expense of training a chorus for the dithyrambic contests at the Dionysia he was brutally assaulted by his old enemy, Meidias. As the offense was committed against an official in a great religious festival Demosthenes brought the matter before the assembly by means of a "presentment." Encouraged by the favorable vote which in itself had no legal consequences,

[8] I.e., in case of failure to obtain at least one-fifth of the votes.

he brought a criminal action for aggravated assault. Having heard that Meidias intended to object that he should have sought redress by a civil suit, he remarked in the course of his speech:

> If I had not preferred my plaint in the assembly, but sued him in an action the contrary objection would have started up, that if there were any truth in these charges I should have arraigned him in the assembly. . . . . It is the practice with defendants who have done wrong, in order to defeat the proceedings against them, to suggest that some other proceedings which are not practicable should have been adopted.

In the latter part of the fourth century a client of Hyperides objects to being impeached rather than indicted before a regular court.

> Impeachment has hitherto been employed against people like Timomachus, Leosthenes, Callistratus, Philon, and Theotimus who lost Sestos, and others. Some of them were charged with betraying ships which they commanded, some with betraying cities, and one with giving, as an orator, bad advice to the people. . . . . The present state of affairs is ridiculous—Diognides and Antidorus are impeached for hiring flute-players at a higher price than the law allows; Agasicles of Piraeus is impeached for being registered as of Halimus; and Euxenippus is impeached on account of the dream which he says he dreamed.

Apparently the abuse of impeachment was due to the preference of prosecutors and plaintiffs for a process that neither afforded any opportunity for avoiding direct action by the resort to special pleas nor exposed them to any penalty in case of failure to obtain at least one-fifth of the votes. For if the case did go to a regular court it was at the instance of the assembly. The plaintiff was relieved of responsibility.

A man could not be tried twice for the same offense. But the prosecutor of Euxitheus, a client of Antiphon, charged with murdering Herodes, contrived to expose him to the danger of being twice put in jeopardy of his life. Euxitheus protested vigorously at being tried as a "malefactor" when the charge should have been murder —a strange protest, one might think. But the prosecutors, it was claimed, sought an advantage in bringing the lesser charge. They and their witnesses escaped the solemn oath required of all prosecutors and witnesses in homicide cases. The penalty for a "malefactor" was assessable by the jury so the prosecutor could ask for capital punishment. Furthermore, while a man charged with homicide was not incarcerated pending trial, the defendant indicted as a malefactor might be held in confinement and seriously hampered in his defense. If acquitted he would still be liable to be tried for murder. It would appear that the prosecutor in the present case claimed to have taken the course he did through fear that Euxitheus would go into voluntary exile if allowed his liberty on a charge of murder according to law and thus escape punishment. Whatever motive actuated him, it is clear that he exhibited considerable skill in achieving his purpose.

The means for excluding illegal evidence were according to modern notions wholly inadequate. Magistrates were loath to exercise what slight powers they may have possessed to exclude, for example, hearsay evidence or the testimony of an incompetent witness. In view of possible attacks at their audits at the end of the year they preferred to be on the safe side and let

dissatisfied litigants seek redress in court. The remedy for false or illegal evidence of any kind was a suit for perjury against the witness. Apparently in order to discourage vexatious and unnecessary prosecutions, the litigant was obliged to proclaim in court before the announcement of the verdict his intention to bring suit for perjury. The notion back of this requirement was that a litigant would be reluctant to take any action that might be construed as an admission that he expected an adverse verdict. Naturally a successful suitor would not wish to institute proceedings for perjury. The formal public announcement of an intention to prosecute involved no obligations. Perjury prosecutions could be abandoned at any point.[9] There are plenty of indications that witnesses were often threatened with prosecution in order to obtain concessions from a successful opponent in the way of extension of time for paying the damages awarded or a reduction of the amount. A person convicted of perjury was fined; three convictions entailed loss of civil rights. But the interest of the principal in the prosecution of one of his witnesses was sufficient to make it desirable to have proceedings dropped. A successful prosecution for perjury might result in a new trial. The comparatively frequent references to dropping perjury proceedings against a witness would seem to indicate that they were often begun for purely tactical purposes in the hope of securing concessions.

That the various schemes for evasion and delay were frequently successful is shown by the experiences of Demosthenes with his archenemy Meidias.

[9] Calhoun, *Classical Philology*, XI, 381.

Having brought an action against Meidias for abusive language, I obtained judgment by default; for he did not appear. The judgment was not paid, and I became entitled to execution; yet I did not levy on his effects but again brought an action for ejectment, but down to the present day I have not been able to try it; such tricks and pretences does he find to baffle me with.

Sixteen years had already elapsed since the action of ejectment had been begun. In the case of *Nausimachus et Xenopeithes* v. *Aristaechmus,* a guardianship suit, a period of eight years intervened between the institution of legal proceedings and the final settlement of the case. *Aeschines* v. *Ctesiphon,* in which Demosthenes delivered his famous *Oration on the Crown,* was delayed for six years. The necessities of the political situation were responsible for this delay. Demosthenes claims that wealthy wrongdoers have a marked advantage over their poorer opponents in the matter of evasion and delays.

The bulk of us, O Athenians, have no share of common or equal rights with the wealthy; indeed we have not. They have what time they please allowed them for answering complaints and their offences come before you stale and cold; whereas if anything happens to one of us he is tried immediately after the act.

A defendant not infrequently sought to embarrass or dispose of an opponent by starting or threatening to start a countersuit where circumstances made it feasible. It was particularly effective against sycophants and professional politicians who were likely to be involved in questionable deals if one examined their records. Crito, the wealthy friend of Socrates, being persecuted by sycophants, secured the services of a shrewd fellow who

by the skilful use of countersuits soon routed the sycophants. It was desirable where possible to select a suit that would disqualify an opponent from using the courts. Thus a client of Antiphon displayed considerable activity in prosecuting some corrupt politicians. To rid themselves of him they seized upon the fact that a member of a boys' chorus that was being trained at his expense died as a result of taking a remedy for some throat disorder, and indicted him on a charge of homicide. The immediate result was that as a polluted person he was disqualified for public appearance for a period of three months before the trial with the possibility of banishment for a period if the verdict was adverse. This was quite sufficient for the purpose of the defendants.

So effective was a charge of homicide for disposing of even an innocent man for a time that there are records of at least three other trumped-up homicide cases and one of felonious wounding. Demosthenes, in his famous case against Meidias for aggravated assault, was in such a plight as a result of suits started or instigated by Meidias that he says he was more likely to be punished for offenses he had not committed than to get justice for the wrongs he had suffered. He adds that this is a common practice with wealthy scoundrels when poor men seek redress in court. Military offenses were favorite charges to bring public odium on a man and render him less effective as an opponent. In the case of active politicians indictments for illegal legislation were readily available for countersuits. There was some danger in bringing ill-founded criminal charges, for it was forbidden by law to drop a suit, and failure to obtain at

least one-fifth part of the votes entailed a fine and partial disfranchisement, which rendered it impossible to bring a similar suit in future. It was, however, often possible to evade the law against dropping a suit by a compromise, for the defendant who agreed to compromise would naturally not prosecute. But men of means were frequently able to avoid this risk by hiring another to bring the suit. Sycophants were not averse to run such risks for a sufficient consideration. Civil suits and homicide cases involved no such danger, for they could be dropped or compromised at any stage.

CHAPTER X

ADVOCATES AND SPEECH-WRITERS

In ordinary criminal and other regular public suits the state relied upon volunteer prosecutors, but where vital national interests were involved advocates were chosen to represent the state. In interstate arbitrations it was customary for each state to select competent men as its counsel. Solon represented Athens in an arbitration with Megara regarding the ownership of the island of Salamis. And Hyperides, a contemporary of Demosthenes, was the Athenian advocate in proceedings before the Amphictyonic Council[1] regarding the control of the sanctuary of Apollo in Delos. He also officially defended Callippus, an Athenian athlete charged with a foul at the Olympic games. Chosen advocates were assigned to watch the city's interest in litigation at home as well as abroad. Ten advocates (*synegoroi*) were selected, apparently by lot, to assist the auditors (*logistai*) in dealing with the accounts of outgoing magistrates. They not only represented the city in the prosecutions that resulted from the discovery of any irregularities, but they passed upon all charges at a preliminary investigation conducted by the auditors. It is perhaps owing to these judicial duties that they were selected by lot, a method of selection not at all suited to secure an advocate.

In the periodic revision of the laws authorized by

[1] See p. 17, n. 9.

the assembly a commission of at least five hundred selected from those available for jury service constituted a court of revision. Five advocates selected by the assembly appeared in defense of the laws it was proposed to amend or repeal. In appeals to a heliastic court from the vote of an Attic township (*deme*) rejecting a candidate for citizenship, five advocates were chosen by the *deme* to oppose the appeal.

It was a common practice to appoint advocates to assist in the prosecution of criminal cases involving important public interests. Thus when Antiphon, the orator, was impeached before the senate as a traitor by the generals, the case was sent to a jury and the generals were instructed to select at least ten members of the senate to assist them in the prosecution. When in accordance with the report of the Areopagus, Demosthenes and others were put on trial for accepting bribes from Harpalus, the absconding treasurer of Alexander, ten orators were chosen to prosecute the case against Demosthenes. The speeches of two of the prosecutors, Hyperides and Dinarchus, are extant. Public advocates were paid a small fee. In the ordinary prosecutions one man lodged the complaint and was responsible for the case, but he was often aided by volunteer advocates. Thus Meletus, the chief accuser of Socrates, was aided by two others, Anytus and Lycon.

In private (civil) suits the principals were required by law to handle their own cases in court, but the law was not rigidly enforced. It would have been a hardship to insist that everybody should conduct his own case without assistance. The jury regularly permitted a

relative, friend, or associate to assist a litigant by making a plea in his behalf at the close of the proceedings or even to take his place and conduct the whole case. Apparently no serious difficulty was encountered in securing such permission. Strepsiades, in the *Clouds* of Aristophanes, anticipated no difficulty in having his son appear in his stead against his numerous creditors after he had learned "evasion of a suit and persuasive counterargument" in the comic law school of Socrates. Miltiades, the victor of Marathon, being unable by reason of a severe wound to speak in his own defense when impeached in the assembly was defended by his friends. Pericles defended his friend, the philosopher, Anaxagoras, on a charge of impiety. And Aphareus spoke in place of his stepfather, Isocrates, who was unable, owing to illness, to appear in the *antidosis* proceedings instituted against him to force him to undertake a trierarchy. The speech, however, was composed by Isocrates. Sometimes the litigant himself made a few perfunctory introductory remarks and asked to be represented by a friend. Such a request was preferred by the banker Phormio on one occasion in the course of litigation with his stepson Apollodorus. And Apollodorus himself was the real prosecutor of Stephanus and Neaera, though his brother-in-law Theomnestus laid the indictment and made a few introductory remarks.

The extant requests to the jury for permission to call an advocate are usually formal and perfunctory. "I have said what I could. I call for some of my friends if you bid me." Often acquiescence on the part of the jury is assumed. "I have presented my case as best I could.

If any one here present is able to say anything in my behalf, let him come forward and address you." Occasionally more pretentious requests are found such as the following from Hyperides:

> You have heard, Gentlemen of the jury, practically all I have to say for myself. Since my accuser, who is not inexperienced in speaking but is accustomed to engage in litigation frequently, summoned advocates to help him destroy unjustly one of the citizens, I beg and entreat you to permit me also to summon men to my aid in such an important trial, and to listen in a friendly spirit if any of my relatives or friends can aid one who is your fellow citizen and an amateur unaccustomed to public speaking. I am engaged in a contest in which I not only run the risk of being put to death—for this is of least importance in the eyes of right thinking people—but of being banished and buried outside my native land. If then, you bid me, I call upon someone to help me. Come forward, Theophilus, and say what you can in my behalf. The jurors bid you.

In the beginning advocates were drawn from among a man's relatives by blood or marriage or his more intimate friends and neighbors, particularly his fellow-demesmen, the members of the township in which he lived. On occasion the local assemblies of the demes even selected advocates to aid one of their number. Andocides, one of the Ten Orators, was aided by representatives of his deme in his defense against the charge of profaning the Mysteries. Thus the municipal system of Attica, developing as it did intimate relations among the members of the comparatively small local communities, contributed in no small degree to spreading the practice of employing advocates. The practice was further spread, particularly among city-dwellers, by means of clubs de-

voted largely to serving the interests of their members in politics and litigation.[2] Eratosthenes, one of the Thirty Tyrants, was no doubt aided by members of the oligarchic clubs when he was attacked by Lysias on his audit. When Meidias was prosecuted by Demosthenes for aggravated assault, fellow members of clubs were on hand to aid as they had done when the case was brought before the assembly by means of a "presentment." Aeschines, in warning the jury not to permit Demosthenes to persuade them to acquit Timarchus, asks: "Shall Demosthenes beg off his associates?" Club members could also use their influence to gain advocates outside the club membership for fellow-members. A litigant was aided not only by his own friends and associates but occasionally also by the personal and political enemies of his opponent.

By the middle of the fourth century the practice of securing advocates is firmly established. Litigants no longer pretend that the advocate is a relative or friend. "What is more democratic," exclaims a client of Hyperides, "than that those who are able to speak should aid those who are unable to do so when they are involved in danger?" In another case Hyperides himself acting as advocate defends the custom in a very vigorous manner. "Of all the excellent features of democracy none is more in keeping with the democratic spirit than the custom of allowing anyone who wishes (ὁ βουλόμενος) to go to the aid of an inexperienced man who is involved in the dangers of litigation and is unable to defend himself adequately." The appeal to the democratic spirit

[2] Calhoun, *Athenian Clubs*, p. 95.

seeks to put the practice on a high plane, almost on a level with the duty and privilege of prosecuting a criminal. The words, "anyone who wishes" (ὁ βουλόμενος), would inevitably recall the Solonian law which permitted "anyone who wishes" to prosecute wrongdoers. Thus interpreted, advocacy becomes a praiseworthy exhibition of the spirit of mutual helpfulness characteristic of the Greek ideal democracy.

Prosecutors were quick to realize how helpful advocates were to defendants on trial. Occasionally they request the jury to refuse to listen to them, or seek to neutralize the effect of their pleas in advance by personal attacks, but they never question their right to appear. The most bitter attack on advocates is found in Lycurgus, the relentless prosecutor who rivaled Draco in sternness.

> I wonder on what ground those who intend to speak in behalf of Leocrates will ask for his acquittal. Is it because of his friendship for them? But in my opinion they do not deserve a favor but death because of their intimacy with him. Before Leocrates did this thing it was not known what manner of men they were, but now it is manifest to all that they cherish his friendship because they are of the same character. And so they ought rather to defend themselves than to ask you to acquit him.

Advocates' speeches range all the way from a careful discussion of the facts as brought out by the principal and the law applicable to the case to mere rhetorical and emotional appeals. Where an advocate has personal knowledge of the circumstances he closely resembles a witness giving oral testimony. Such detailed statements of matters of fact aided by the personality and rhetor-

ical skill of an experienced speaker were immensely more effective than the brief formal affidavits of the fourth-century practice. All advocates bore testimony to the good character of the principal. Sometimes the speech contained a recital of the advocate's own services to the state coupled with the request that in recognition of these services the jury should return a favorable verdict. In cases where the principal either does not appear at all or else makes some perfunctory remarks with a request to be represented by a friend the advocate is in exactly the same position as the next of kin who represents a woman or a minor. He takes the entire responsibility of the case, presents the evidence and makes a speech such as the principal would have made. Among the extant orations delivered by advocates one composed by Isaeus[3] approximates most closely the address of a modern counsel. The principal marshaled the facts and presented the evidence. He was followed by a friend of his deceased father who gave a résumé of the whole case, skilfully bringing out the strong points and disguising the weaknesses.

An advocate was forbidden by law to take pay for services rendered to an individual; but the law was widely disregarded. "I am astonished," says Lycurgus, "if you do not see that your extreme indignation is well deserved by men who although they have no tie whatsoever either of kinship or of friendship with accused persons continually help in defending them for pay." Demosthenes also complains that the rich man had an ad-

[3] There is a tradition that Isaeus himself delivered this speech (IV) as an advocate.

vantage over his poorer rival in securing the services of advocates. "We are told," says Plato in the *Laws*, "that by ingenious pleas and the help of an advocate the law enables a man to win a particular cause whether just or unjust; and that both the art and the power of speech, which is thereby imparted, are at the service of him who is willing to pay for them." In the case of public advocates the tendency toward professionalism was in a measure checked by a law which forbade the employment of a man in this capacity more than once. The main purpose of this prohibition was to secure a fair distribution of this kind of public service. But this law also was a dead-letter one. It was not possible that a sufficient number of capable men could be found for the important task of guarding adequately the interests of the state on all occasions without calling on the same men more than once. But even if these laws could be disregarded with impunity there were still difficulties inherent in the Athenian system which limited the usefulness of an advocate. A litigant could not be a witness, neither could the testimony of his wife, infant children, and female relatives be produced in court. Consequently, the sole means of getting before the court facts known only to the litigant and the members of his family was through the medium of an address by one who had first hand knowledge of the situation. A relative or friend could claim to be familiar with many features of the case owing to his intimate association with the litigant and his family; but a professional pleader could make no such claim with regard to a series of clients. Under these circumstances it is easy to see that only in

comparatively rare cases would the advantages of having a substitute even if he were an excellent speaker outweigh the disadvantages resulting from the silence of the principal.

There was no objection on the part of the public to the services of an advocate rendered freely to relatives, friends, associates, and fellow-demesmen. It was only when these services were rendered for a fee and became professional that public opinion became hostile. Objection was taken not to the service but to the motive back of it. Hence the law forbidding pay for services that should be rendered in a spirit of mutual helpfulness. To be sure it was an open secret that the law was frequently evaded. The result was that advocates, especially if they were not connected with the litigant, were more or less on the defensive. This appears from the fact that handbooks on rhetoric always suggest reasons that may be given by an advocate for his appearance in the case, such as friendship for the one party or hostility toward the other, familiarity with the details of the case, the public good, or the desire to assist one who was wronged and friendless. The rule against pay in private cases and regular employment as public advocates effectively prevented their being recognized as experts. They were never able to speak to the dicasts with authority as does the modern counsel or barrister who, if eminent in his profession, is listened to with respect even by judges. A few advocates no doubt acquired considerable influence by reason of their public services which they took pains to recite in court. But their appearances could not be frequent and their prestige was in no sense due to

their knowledge of the law. Had the advocate been as free to speak for a litigant as the speech-writer was to write for him, Athens would speedily have developed a body of legal experts quite comparable to the Roman *juris consulti* or the modern lawyer.

Unless a litigant could go before a court and tell his story in a fairly effective fashion the services of an advocate would be of comparatively little value. To meet this situation there appeared a new profession—that of speech-writing. The speech-writer or logographer, as he was called, composed for his client an address to be recited in court as his own. The speech-writer was well versed in rhetoric. Indeed, he was often a teacher of the art. In course of time he doubtless acquired very considerable familiarity with law and practice, but the conditions under which he exercised his art forbade his making full use of his legal knowledge. He was obliged to suppress his own personality and write a speech that would seem to be the utterance of his client. The elaborate pretense involved in this system tended to conceal his methods of work and his relations with his clients. His first business was to acquaint himself with the facts of the case so as to present them to the jury in a clear and convincing manner. But this was not all. He must anticipate, as far as possible, the arguments of the opponent and dispose of them. A litigant capable of handling his own case could take notes as Anticleon does in the *Wasps* of Aristophanes, when listening to Philocleon's defense of jury service, and modify his speech as occasion required. But a man who purchased his speech would scarcely venture to disturb it by changes

or additions. In the fourth century a speech-writer might learn something from a perusal of the evidence filed at the preliminary hearings. But the whole of the testimonial and documentary evidence was filed only in suits that were subject to arbitration; in others merely enough was filed to make out a prima facie case. A modern parallel is the testimony presented to a grand jury—just enough to secure a true bill. Much could be learned from the gossip of the *agora* and the lounging-places of the city regarding an opponent's plans. By enlisting the services of friends, relatives, and club members, a litigant might materially supplement the information gathered from the preliminary hearing regarding the plans of his opponent, as the frequent recurrence of such phrases as "I hear he will say" shows. The notorious Apollodorus complained on one occasion that Nicostratus, a former friend, did him a great injury by divulging the arguments he intended to use in some pending litigation. An experienced speech-writer could anticipate arguments and objections by suggesting that someone might raise a particular point. In this way the case could be strengthened even if the objection should never be actually raised. Obviously a speech for a prosecutor or plaintiff presents fewer difficulties than one for a defendant which has to meet not what may be said but what has just been said. It is at once put to the test.

But it was not enough that the speech-writer should familiarize himself with all the details of the case and seek to anticipate and answer his opponent; he must write a speech appropriate to the age, training, pursuits, mode of life, and other characteristics of his client. It

must be clothed in suitable language. Not that the writer ever attempted linguistic realism. Any attempt to reproduce the language of a man who habitually spoke incorrectly would not have been tolerated by an Athenian audience. But careful scrutiny of the orations of Lysias[4] has revealed a few unusual phrases and expressions slightly "removed from common parlance." Such departures from the normal language of forensic oratory as are found in Lysias occur in the speeches written for educated men of the upper classes. Occasionally a member of the lower classes is permitted to use a limited number of words and phrases that are characteristic of popular speech. Lysias, however, exemplifies the art in its highest development. The ordinary writer of forensic speeches was content to compose plain, simple Greek, approximating as closely as possible the prevailing type of forensic oratory.

Rhetorical theory laid a great deal of stress upon the portrayal of character in forensic oratory. It was considered important that both the speech and the thought should by their simplicity and candor render the speaker worthy of confidence. This feature was called *ethopoiia*. In the hands of a skilled speech-writer it became a most effective instrument of persuasion, for an Athenian jury was influenced to a large extent by its opinion of the moral worth of a litigant. *Ethopoiia* also served the purpose of concealing the hand of the writer by introducing into the speeches he wrote a certain variety of style, diction, and method of treatment. It is

[4] Devries, *Ethopoiia, a Rhetorical Study of the Types of Character in the Orations of Lysias.*

impossible to determine whether an artist like Lysias succeeded in deceiving a jury so that they believed his client was delivering his own speech. It is to be supposed that he achieved sufficient success to make it seem worth while to make the effort. In antiquity a number of speeches were attributed to well-known orators which later critics regarded as spurious. But it is still a difficult task to separate the spurious from the genuine. It is not likely that jurors on the basis of a single hearing could do better than generations of critics on the basis of many readings.

Another device for preserving the fiction that the litigant was delivering his own composition was to give the impression that the speech was extemporary. "I have answered all the charges that I remember," says a client of Antiphon. Another litigant, reciting a speech written by Demosthenes, proposed to treat the case from three points of view and asked the judges to indicate which they desired to hear discussed first. It may seem that he ran considerable risk of being seriously embarrassed; but, as a matter of fact, he was taking no chances. The only way by which the judges could indicate their preference was by acclamations, and with three possibilities it would be easy for the speaker to hear a demand for the line of treatment he had already selected. Similarly, a client of Isaeus, after observing that it would be tedious to go into details regarding a certain phase of the case, remarked: "If, however, you bid me I might touch upon a few of them. But if it is as unpleasant for you to hear about these matters as it is for me to speak about them I'll merely produce the evi-

dence offered in the previous trial." Here again the speaker ran no real danger of being forced by the jury to change his plan. On another occasion Isaeus used quite a simple device to create the impression that the speech was really based upon the opposing speech which preceded it. "The main part of my opponent's speech was devoted to the question of my sister's influence in procuring my adoption by her husband, so I must address myself to that phase of the case." But it required no great foresight to anticipate that the emphasis would inevitably be upon a point that was vital to the contention of his opponent.

The speech-writer was not a mere rhetorician. Of necessity he acquired very considerable familiarity with law and procedure. There are plenty of indications that litigants relied upon his guidance from the moment they decided to have recourse to litigation. Thucydides, speaking of Antiphon, says: "There was no man who could do more for those who consulted him, whether their business lay in the courts of justice or in the assembly." Advice as to the client's legal rights and appropriate means of redress are certainly implied by these words. In the *Clouds* of Aristophanes the chorus pictures an attractive and lucrative business for the old man Strepsiades upon the completion of his legal education in the school of Socrates. "Many a client will linger at your door wishing to consult and hold conference with you, ready to take advice on claims and counterclaims involving many talents." Naturally this phase of the speech-writer's activity is not revealed in the speeches he wrote, but opponents were not so reticent. Apollo-

dorus, when he was prosecuting a witness of Phormio for perjury, remarks that he has the services of those who advise and write speeches for the banker, of whom Demosthenes was one. Another litigant speaks of an arrangement made with "Theocrines the speech-writer who was in charge of the opponents' case," according to which part of the damages assessed was to be remitted. The simple, unsophisticated citizen is always represented as getting his laws from the inscribed slabs or painted tablets and consulting his friends on the details of his case.

Bankers and money-lenders constantly made use of the services of agents especially to protect their interests abroad. These services are substantially the same as those rendered by a modern attorney in similar circumstances. Phormio the banker sent Stephanus, his representative to Chalcedon, to secure the release of a ship in which he was interested. In the ensuing litigation Stephanus handled the case in court. Stephanus is accused of performing less creditable services for his client such as Pythodorus[5] performed for the banker Pasion. Similarly, two money-lenders sent one Aristophon to Cephallenia to protect their interests in a ship on which they had lent money.

Politicians found frequent use for agents in litigation. Aristogeiton, a notorious agent of the Macedonian party in Athens, indicted Demosthenes seven times and attacked him twice at his audit. And Demosthenes himself delivered some of his most vigorous attacks on his political opponents by means of agents. When Demos-

[5] For the activities of Pythodorus see p. 233.

thenes was pressing his charge of aggravated assault against Meidias, Euctemon, described as a rascal of all work, was hired to charge Demosthenes with a military offense—desertion. The case was not pressed, and Euctemon was punished by fine and partial disfranchisement. But Meidias had gained his object in having Demosthenes posted as a deserter, and could well afford to pay Euctemon his price. Stephanus, who is represented as thoroughly unscrupulous, was hired by interested persons to secure the banishment of the litigious Apollodorus whose activities aroused much enmity against him. Stephanus brought a charge of homicide, suborned witnesses, and himself swore that Apollodorus had killed a female slave. But the plot was exposed in court and the defendant was discharged.

Business men of Athens, just as corporations today, often found it to their advantage to keep the same men in their employ as agents. The closest approach to the modern practice of retaining the services of an expert in litigation is the employment of Archedemus by Crito, the wealthy friend of Socrates, which Xenophon recounts in his *Memoirs of Socrates*. Crito complained that at Athens it was difficult for a man who desired to mind his own affairs to escape annoyance and loss at the hands of the sycophants. "As for instance at this moment," continued Crito, "a set of fellows are threatening me with lawsuits, not because they have any misdemeanors to allege against me, but simply under the conviction that I will sooner pay a sum of money than be troubled further." To which Socrates replied:

Tell me, Crito, you keep dogs, do you not, to ward off wolves from your flocks?

Certainly, it pays to do so.

Then why do you not keep a watchman willing and competent to ward off this pack of people who seek to injure you?

I should not at all mind [he answered] if I were not afraid he might turn again and rend his keeper.

What [rejoined Socrates], do you not see that to gratify a man like yourself is far pleasanter as a matter of self interest than to quarrel with you? You may be sure there are many people here who will take the greatest pride in making you their friend.

"Accordingly they sought out Archedemus, a practical man with a clever tongue in his head, but poor; in fact, he was not the sort of man to gain by hook or crook, but a lover of honesty, and of too good a nature himself to make his living as a pettifogger. Crito would then take the opportunity of times of harvest and put aside small presents for Archedemus of oil or wine or wool or corn or any other of the farm produce forming the staple commodities of life, or he would invite him to a sacrificial feast, and otherwise pay him marked attention. Archedemus, feeling that in Crito's house he had a harbor of refuge, could not make too much of his patron, and before long he hunted up a long list of iniquities that could be lodged against Crito's pettifogging persecutors themselves, and not only their numerous crimes but their numerous enemies; and presently he prosecuted one of them in a public suit where he would have had to submit to a decision as to pains and penalties. The accused, conscious as he was of many rascally deeds, did all he could to be quit of Archedemus, but Archedemus was not to be got rid of. He held on until

he had made the informer not only loose his hold of Crito, but himself pay a sum of money; and now that Archedemus had achieved this and other similar victories it is easy to guess what followed. It was just as when some shepherd has got a good dog, all the other shepherds wish to lodge their flocks in his neighborhood that they too may reap the benefit of him. So a number of Crito's friends came begging him to allow Archedemus to be their guardian also, and Archedemus was overjoyed to do anything to gratify Crito. And so it came about that not only Crito abode in peace but his friends likewise." The net result of the whole proceeding was that Archedemus was now Crito's right-hand man. In some respects this relationship between Crito and Archedemus resembles that of the Roman patron and client rather than the relation between lawyer and client though the service rendered is practically the same.

Crito was not the only friend whom Socrates advised to obtain expert aid in litigation. In his trial one of the accusations was that he recommended his friends and companions not to seek the advice of friends and relatives when engaged in a lawsuit but rather to consult experts in litigation. The accuser pretended that such advice tended to lower fathers and other relatives in the estimation of the young men who associated with Socrates. The fact that Socrates applies his favorite doctrine that laymen should be guided by experts to the field of litigation shows conclusively that experts in law were available just as physicians with whom Socrates compares them.

Politicians were in the habit of employing experts

to draft the laws they introduced or sponsored. Lycurgus employed Euclides, an Olynthian, for this purpose. Owing to the danger of being indicted for illegal legislation it was desirable to be sure that the law to be proposed was properly drawn and that all formalities had been properly complied with. Sometimes an agent was procured to introduce legislation with which a politician did not wish to be identified. The agent took the risk of being punished for illegal legislation.

The so-called Expounders or Exegetes were experts in religious and ceremonial matters, including pollution and purification; but sometimes they were consulted by persons in doubt as to their rights and duties in connection with a homicide. Euthyphro, in the Platonic dialogue that bears his name, tells how his father secured and bound a hired servant who had killed a slave, and sent to consult the Expounders as to what he should do under the circumstances. And a client of Demosthenes explains to the court that they had advised him not to prosecute the slayers of his old nurse because she was neither a relative nor a slave. This was sound advice which anyone familiar with homicide law could have given.

The practice of using speeches prepared by experts in all probability originated in the schools. One might go to a teacher of rhetoric for instruction with a special case in view. For example, Demosthenes is said to have prepared for his suits against his guardians by working up the case with the assistance of Isaeus who was an expert in that department of litigation. From giving such aid to writing a speech was an easy step. Speech-writing

was the only service rendered in litigation that became professionalized. The speech-writer was not forbidden by law to accept remuneration for his services. Indeed, such a prohibition would have been quite futile. Nevertheless, there appears to have been a prejudice against the practice in some quarters. At any rate, Anaximines,[6] the author of a handbook on rhetoric, advises that if one is criticized for using a written speech he should reply:

> The law no more forbids me to use a written speech than it bids you use an unwritten speech. The law does not permit a man to act as you do, but it permits him to speak as he pleases. My opponent, Gentlemen, thinks that his misdeeds are so great that only an elaborate written discourse can offer an adequate indictment.

Whether the speech-writer handled the entire case for his client or merely wrote speeches for him to recite in court he must soon have become expert in the law, as may be seen in the case of Isaeus. But his sphere was narrow. He must conceal his identity, his personality, and to a great extent mask his knowledge of law. Consequently, his skill and learning were to a certain extent wasted.

That the speech-writer's profession was not above reproach is shown by Anaximines' suggestion that when one is criticized for teaching litigation or composing forensic speeches for others he should reply that everybody aids his friends to the best of his ability and that

[6] *Rhetorica ad Alexandrum*. The authorship is uncertain. An English version is included in the Oxford translation of Aristotle in deference to the practice of including the treatise among the works of Aristotle.

there is no difference between giving a man advice and giving him instruction. Thucydides notices in the case of Antiphon the popular prejudice against professional rhetoricians.

> Although Antiphon did not come before the assembly or willingly take part in any public contest but was under suspicion with the people on account of his reputation for cleverness, yet he was the one man most able to help any who were involved in contests either before the assembly or in the courts if they sought his advice.

The Ten Orators, with the exception of Andocides and Lycurgus, practiced the profession. Isocrates, it is true, abandoned it early in his career and seems to have regarded the forensic speeches he wrote for others as youthful indiscretions to be disowned and forgotten. He preferred to be known as the composer of epideictic orations on national and Hellenic topics. Here and there throughout his speeches one finds uncomplimentary remarks such as the following:

> Athens alone is able to support a numerous body of speech writers. Elsewhere they would starve.
>
> Forensic speeches are a bore. They are tolerable only on the day of delivery.
>
> The pupils of those who teach the higher types of oratory, Hellenic, political, and panegyric, do not lay informations and bring indictments and plot against the possessions of others. The clients of the speech writers are those who are either themselves in trouble or are responsible for the trouble of others.

Litigants even when they were themselves using purchased speeches were not slow to play upon the popular distrust of professional rhetoricians. A client of Demosthenes says:

> Lacritus the defendant has not come into court relying on the justice of his case but knowing perfectly well what has been done by himself and his brother in the matter of this loan, and considering that he is clever at speaking and can easily provide arguments for a bad cause. He imagines he can mislead you as he pleases. This is his profession, and he asks money and collects pupils, engaging to instruct them in these very things.

Both Demosthenes and Aeschines use "speech-writer" as a term of reproach. Hyperides, in a speech which he composed for a client for a fee, goes so far as to describe the defendant Athenogenes as "a common fellow, a speech-writer." This may be a bit of humorous cynicism to amuse the dicasts or it may be seriously intended to help to sustain the delusion that the plaintiff was delivering a speech composed by himself.

Specific charges against individual speech-writers are rare. Aeschines, in one of his tirades against Demosthenes, calls him "busybody" and "professional informer," and proceeds to make a general charge that Demosthenes betrayed his clients. "From being a trierarch he suddenly came forward as a hired writer of speeches, after he had disreputably squandered his patrimony. But when he had lost his reputation even in this profession, for he disclosed his clients' arguments to their opponents, he vaulted on to the political platform." Elsewhere Aeschines makes the specific charge that Demosthenes communicated to Apollodorus a speech he had composed for the defendant in *Apollodorus* v. *Phormio*. This is bad enough, but other writers go so far as to charge Demosthenes with writing speeches for both sides. Plutarch, in his life of Demosthenes, remarks that

he is said to have written for Apollodorus his speeches against both Phormio and Stephanus [a witness of Phormio in *Apollodorus* v. *Phormio* whom Apollodorus prosecuted for perjury] for which he justly fell into disrepute as he also wrote the speech for Phormio in the same case. . . . . This [adds Plutarch, having in mind the fact that Demosthenes' father was a sword-maker] was as bad as selling swords to both sides.

If there was any truth in this story it is a matter of surprise that Aeschines did not include it in his specific arraignment of his opponent. "You, Demosthenes, wrote a speech for Phormio and were paid for it: this speech you communicated to Apollodorus who was bringing a capital charge against Phormio." As a matter of fact, this was not a criminal case at all, but a civil suit for twenty talents. At most Phormio might have suffered disfranchisement if he lost the case and failed to pay the damages. If Aeschines was capable of such a gross misstatement he surely would not have failed to add that Demosthenes wrote the speech against Phormio for Apollodorus if he had ever heard the story. This speech against Phormio is not extant, but the speeches against his witness Stephanus on trial for perjury are found in the Demosthenic *corpus*. As a successful prosecution for perjury involved a retrial of the original case the writing of a speech against Stephanus, as Plutarch charges, was as great a breach of trust toward his client Phormio as writing a speech against Phormio in *Apollodorus* v. *Phormio* would have been. But so far as the speeches against Stephanus are concerned the charge that Demosthenes wrote them may be dismissed, for modern critics are agreed that they are not the work of Demosthenes. The story that he composed the speech

against Phormio the banker may have arisen from the fact that a speech against Phormio, a merchant, is attributed to Demosthenes and preserved along with his genuine speeches. Charges that friends and acquaintances with whom litigants discussed their cases disclosed them to their opponents are not unknown. Curiously enough, in connection with this very suit, *Apollodorus* v. *Phormio,* Apollodorus himself accuses his quondam friend, Nicostratus, of disclosing his arguments to Phormio. It is easy to see how a litigant betrayed by an indiscreet friend might unjustly accuse the speech-writer in charge of his case.[7]

Rhetorical theory paid considerable attention to the means available for securing *ethopoiia,* the portrayal of character. A modern lawyer has his reputation, character, and forensic talents to win the jury in all cases. The Athenian speech-writer had to win the jury each time while concealing his talents behind the mask of his client. The earlier speech-writers paid little attention to delineation of character. They had other problems to solve before devoting themselves to the niceties of the art. The most successful orator in this field was Lysias.

> In all the varied cases that each day brought Lysias excels in reflecting with his flexible style the thousand and one shades of emotion, and in reproducing accurately the thousand and one more or less dramatic phases of daily life. He is in turn modest, insinuating, ironical, animated. He weeps or he is indignant; he supplicates or he shouts. He catches the spirit of every period of life under all conditions, and that too with a restraint and propriety which is a masterpiece of art and the only indication of the com-

[7] Drerup, *op. cit.,* takes a more serious view of the charges of Aeschines; cf. Egger, *Mémoires de Littérature Ancienne,* p. 368.

mon origin of his speeches. Similarly in the drama of Sophocles, Oedipus and Antigone betray in the eloquence of their different characters the talent of the same eminent poet.[8]

Regarding the *ethopoiia* of Isaeus, the immediate successor of Lysias, modern critics are not in agreement. Jebb believes that only in the "portrayal of the ingenuous youth or the plain man" Isaeus fails by reason of his "more trenchant and metallic art." "It is in the attraction of a guileless and gracious simplicity that he is inferior. Where Lysias would have said, *It is shameful,* Isaeus says, *It is absurd.*" But most attentive readers of Attic oratory will be inclined to agree rather with Dobson. "The *êthos* of Isaeus consists not in making his characters speak as they naturally would have spoken, but in putting their arguments for them in the way most likely to appeal to the reason and feelings of the judges." *Ethopoiia* is a talent rather than an art. In spite of elaborate discussion and analysis of this elusive quality of forensic speeches in the handbooks of rhetoric it was in the nature of things attainable only by the gifted few. And unless it could be well done it was better for the speech-writer to abandon all attempts at deluding or diverting the dicasts in this fashion and to devote his energies to persuading them by argument. This is particularly true in the case of Isaeus whose practice lay so largely in the probate court of the Archon. The intricacies of the Athenian law governing the devolution of estates must be grappled without apology or pretense by an expert. There was no place for the ingenuous youth or the plain man in the fierce struggles of relatives

[8] Translated from Egger, *op. cit.*, p. 372.

by blood, marriage, or adoption for an estate. And so Isaeus quite properly draws upon his wealth of legal lore and employs without restraint his skill in argument to equip his clients for these difficult contests. Although the effort on the part of speech-writers to achieve *êthos* was never wholly abandoned as any reader of the speeches of Demosthenes and Hyperides may observe, yet the achievement of Lysias who had the dramatist's talent for character portrayal was never equaled or approached by his successors.

In still another respect Isaeus departs from the practice of his predecessors and recognizes the realities of the situation and the necessity of interesting and persuading the judges even at the risk of failure to edify them. The earlier orators use figures of language—the combination of words for the artificial expression of an idea e.g., antithesis—rather freely. But figures of thought—the suggestion of an idea which is itself artificial, e.g., rhetorical questions—seldom occur. Figures of language are mere rhetorical ornaments, but figures of thought lend animation to a speech. Questions which the speaker himself answers, quotation of what others have said, and the answer to possible objections are familiar examples. It is significant in this connection to observe that Andocides who was not a product of the rhetorical schools but was possessed of a natural aptitude for public speaking used figures of thought quite freely and naturally. Such effectiveness and charm as he possesses are due in considerable measure to his use of figures of thought which are much more natural than figures of language in the mouth of an ordinary speaker,

though a Greek speaker who tried to be emphatic could hardly avoid antitheses. An ancient critic, Dionysius of Halicarnassus, says that Isaeus was the first trained orator to employ figures. He must of course mean that Isaeus was the first to use figures of thought freely, a fashion followed by his pupil Demosthenes who excels all the orators of Athens in his skilful and effective use of figures of thought.

Sicilian rhetoric contributed a device to the art, the so-called "arguments from probability" (εἰκότα), that was very popular with the earlier orators, especially Antiphon. The stock example as given by Aristotle is as follows:

> If one is not open to a charge of violence, as for instance being infirm, he escapes on that ground. For it is not *likely* that he could or would attack. But if in point of size he is open to a charge of violence he defends himself on the ground that he is strong. For it is not *likely* that he would commit the crime because he would be liable to be suspected.

The double-edged applicability of the argument caused it to be suspected by the multitude. The fallacy, as Aristotle points out, lies in the failure to distinguish abstract from particular probability as illustrated by the couplet of the Sicilian poet Agathon:

> One might say that this is quite probable:
> That many improbable things happen to men.

Aristotle continues:

> For that which is contrary to probability does happen, so that even the improbable is likely to happen, but not the absolutely or simply improbable. . . . . The expression "improbable" means

not absolutely improbable but improbable in some special sense, such as "under ordinary circumstances," or "as an every day occurrence."

A few illustrations from Antiphon will show how it worked in practice. In the Herodes murder trial it was claimed that a slave confessed that he had helped the defendant, Euxitheus, to dispose of the body of Herodes, but had not participated in any way in the slaying. "The probabilities," says the defendant, "are on my side. For surely I am not so utterly foolish as to commit the crime myself to avoid the risk of having an accomplice, and then when the deed was done to procure accomplices and witnesses against me." The argument sometimes takes the form of a question or a contrary-to-fact condition. In answer to the claim that he disposed of the body by casting it into the sea, he inquires:

How has not the boat been discovered, for it is probable that some clue would be found in it if a man had been murdered and cast into the sea by night? . . . . I should certainly have disposed of the two men and not have left them behind as informers if I had been conscious of guilt.

Coming to Lysias, we find that the more obvious forms of the argument are disguised or abandoned. Lysias' practice in this regard is in part due to his desire for *êthos*. Clearly the balder and more obvious forms of rhetorical devices are quite unsuited to the "ingenuous youth or plain citizen." Lysias was also influenced by the popular distrust of the "cleverness" of the professional rhetorician. No doubt Antiphon's use of the argument from probability was one of the reasons for

his reputation for cleverness which aroused so much popular distrust that he avoided appearing before public assemblies or tribunals. On more than one occasion Plato expresses disapproval of the argument from probability. It is "a wonderfully mysterious art" in which men "bid goodbye to truth." It is only fair to observe that the inverted form of the argument as it appears in Aristotle's example occurs nowhere in real speeches. It is confined to the practice speeches (tetralogies) of Antiphon. Rhetorical theory continued to discuss the argument, enlarging its scope and disguising its form. In the successors of Lysias we observe a constantly diminishing as well as a more subtle use of the argument from probabilities. It has survived in modern times in the form of speculations as to motives for committing a specific crime.

These and other changes from early practice as exhibited in the speeches of Antiphon and Lysias are natural developments of an art that had to adapt itself to the conditions in which it was applied. The austerity and artificiality of Antiphon, though in keeping with the religious and ritualistic atmosphere of a fifth-century murder trial, were quite out of place in ordinary litigation. And Lysias, admirable as he is in his simplicity and reserve, lost something in forcefulness as a comparison with Isaeus abundantly shows.

A rather effective type of argument used by all the orators was the so-called *argumentum ex contrario* based upon a supposed reversal of the case on hand. It is a simple method of argumentation which puts the point before the court in a way that arrests attention and

arouses interest. It also makes full use of the natural adaptability of the Greek language to antithetic statements. Anyone could learn it, and it was applicable to every kind of case. Every one of the speeches of Antiphon contains one or more examples.

I am confident that if the defendants had approached me as soon as they knew that I was going to prosecute the slayer of my father and had expressed their willingness to turn over their slaves for examination and I had been unwilling to accept them this in itself would have been the strongest proof of their innocence. But since I am willing to question their slaves myself or permit them to do it in my stead it is of course only fair that this same situation should be evidence in my favor that they are not innocent. For if in case of their willingness to surrender their slaves for question I had not accepted them this would have been evidence in their favor. Therefore let the same situation be in my favor since although I was ready and willing to bring the matter to the proof they are unwilling to consent.

This is a labored and awkward performance, which is not improved by the repetition in the last two sentences. Later orators did better. The following example is found in a speech by a contemporary of Demosthenes:

Suppose, men of the jury, that the reverse had happened, and that it was not this man's deceased brother who owed me the money, but I who owed the brother money, do you think that the defendant would not exact the debt from me with the utmost severity? And if I had dared to offer a special plea that the action was not maintainable, I am sure he would have been indignant. Then, Lacritus, if you consider this just for yourself why should it not be just for me?

The *argumentum ex contrario* is found in the Platonic *Apology* of Socrates. "If I were really a stranger speaking to you in my native dialect you would have over-

looked it. So now I beg of you to disregard my style of speaking which does not conform to the forensic standard to which I am a total stranger." And in the same speech, Socrates arguing that exile would be impossible says: "I am not so foolish as not to be able to reflect that if you my fellow citizens could not endure my walk and conversation but are seeking to be rid of me strangers will certainly not endure me." Sometimes it serves to point a contrast. "It would be most scandalous if you gave a verdict in favor of others when they prove that they are closest to a deceased person *either* in blood *or* in friendship, but should decide that we who are admitted by all to be closest to the deceased in *both* blood *and* friendship deserve no share in his estate."[9]

The Greek attitude toward invective and personal abuse in public is quite different from the modern point of view.[10] The debate between Achilles and Agamemnon in the first book of the *Iliad* is filled with epithets that would not be tolerated in any modern assembly, where parliamentary language is insisted upon. "Thou clothed in shamelessness, thou of crafty mind, thou sot, thou with the face of a dog and the heart of a deer" are epithets, used without protest, by Achilles in addressing Agamemnon. It is well-nigh inconceivable that any man should tamely submit to such insults and still retain the respect of his followers, not to mention his own self-respect. Attic comedy, which in its origin goes back to the Phallic songs in honor of Dionysus and the crude per-

[9] Cf. Gebauer, *De Argumenti ex Contrario Formis.*

[10] Forsythe, *op. cit.*, p. 51; Brédif, "Invective in Greek Eloquence," *Demosthenes* (trans. by Macmahon), chap. viii.

sonalities exchanged by the hilarious bands of revelers that participated in the celebration, affords many examples of the Athenian tendency to resort to abusive and insulting language. This is particularly true of the *agon,* or standard argument in comedy. Among the orators no one excels Demosthenes in his speech against Meidias in the use of gross and insulting language, such as "miscreant," "wretch," "blackguard," "scoundrel," "cur," "coward," "rascal," "rogue," "bully," "villain." His treatment of Aeschines is almost as scandalous, and Aeschines repays with interest. "Solon forbade the uttering of slanderous words in temples, law courts, public offices, and during the celebration of festivals." But apparently the law was more honored in the breach than in the observance. According to a client of Lysias, it was a mark of litigiousness to bring a suit for slander. "Audiences," says Demosthenes, "enjoy listening to accusations and abusive language."

One will search in vain in the earlier orators for parallels to the epithets Demosthenes applies to Meidias or some of the exchanges between Demosthenes and Aeschines which are better suited to the comic stage than to a court of law. Antiphon, in the three speeches which are extant, shows admirable restraint and dignity. He never descends to scurrilous abuse, and only once does he apply an epithet to an accused person. A woman charged with killing her husband is called a Clytemnestra. This melodramatic touch serves to relieve the tragic tone and austere manner that characterize all the speeches of Antiphon. His adversaries may be untruthful and unscrupulous, but he refuses to employ abusive

language in speaking of them. In one of his practice speeches he adopts a tone and attitude which are not in harmony with the prevailing tone of later forensic oratory. "The behaviour of my adversary shows, better than any argument could, that necessity constrains men to speak and act contrary to their better natures. Heretofore he has been by no means shameless or desperate, but now his misfortunes have driven him to use language which I never expected to hear from him." But that Antiphon could employ invective and resort to personalities is clear from the fragment of a lampoon on the notorious Alcibiades. Lysias differs markedly from Antiphon in forensic speeches. As a rule he is dignified and genial, but on occasion he employs sarcasm and gross personalities, as well as jest and witticisms. Even the cripple, privileged character that he was who flouted the senate and transgressed many of the rules of forensic propriety, refrains from coarseness and scurrility. In his prosecution of Eratosthenes, one of the Thirty Tyrants whom Lysias charged on his audit with the murder of his brother, his restraint is remarkable. Only once does he apply an epithet to him—"most merciless of men." This is all the more surprising because a client of his attacks Nicomachus, the legislative commissioner, most fiercely. "Instead of a slave he has become a citizen, instead of a beggar a man of means, instead of an underclerk a legislator. . . . . He who ought to be put on trial by your democracy is shown to have been a subverter of democracy." One wonders at the bitterness of this attack on a man whose only offense was dilatoriness in completing a revision of the laws. It may be that the client whose

character he portrays was a passionate man given to personal abuse and sarcasm. Isocrates also, though usually mild and restrained in language, indulges on occasion in abusive language that compares favorably with Demosthenes' best efforts.

What accuser could adequately set forth this man's deeds? Or who could find a more striking example of injustice, false accusation and rascality? Some evil deeds would not reflect the whole character of the perpetrators. But from such evil deeds as this man has committed one could discern the whole life of the wrongdoers. From what would a man refrain who testifies that the living are dead? What would a man not venture to do in his own interest who was such a villain in the interests of others? How could you rely upon his statements in his own behalf when he was convicted of perjury in behalf of another? Who was ever more manifestly convicted of bearing false witness? Other men you judge on the basis of words, but that this man's testimony was false the jurors saw.

Then follows a story of how Callimachus and a dozen others swore that a woman who was subsequently produced in court was dead. In less artistic fashion Isocrates characterizes Pythodorus, the right-hand man of the banker Pasion.

Who of you does not know that last year he opened the urns and took out the list of judges put in by the senate? What wonder if a man who at the risk of his life for a small reward had the hardihood to open the urns sealed by the *prytaneis,* counter sealed by the *choregi,* guarded by the stewards and deposited in the Acropolis, expecting to profit handsomely, tampered with a scrap of paper deposited with an alien, either by bribing his slaves or in some other fashion?

Andocides, a man of excellent antecedents but wholly without technical training in oratory, comes nearer to

the standards set in the next generation by Demosthenes and Aeschines when the bitterness of political strife had lowered appreciably the tone of public speech than to the artistic invective and studied personalities of Isocrates, as the following story he tells about a witness abundantly shows:

> Having married a wife he proceeded to marry an additional wife, her mother. And the mother ousted the daughter. While living with the second wife he desired to wed the daughter of Epilycus in order that the granddaughter might drive out the grandmother. But what name ought we to give his son? I think no one is so good a calculator as to discover a name for him. For as his father had three wives he is the son of one, the brother of another and the uncle of the third. Who is he? Oedipus or Aegisthus?

Andocides' aristocratic political bias is shown by the language he uses of Hyperbolus, a notorious democratic politician: "I am ashamed to mention Hyperbolus whose father is a branded slave and even now is employed in the public mint. He himself is an alien, a barbarian, and a lampmaker by trade." Although the speech-writers did not hesitate to attack an opponent or his relatives, advocates, and witnesses, their attacks were redeemed from vulgarity by their literary form or the humorous or ironical tone. Lysias, in fitting a speech to a particular client, allowed himself some latitude and descends occasionally to more or less violent abuse when the character and temper of his client warranted it. But as political passions were aroused in the struggle with Philip and trials for illegal legislation became in fact great political tests of strength intended to ruin the defendant as a public leader, all restraint was thrown aside and Achil-

les rather than Antiphon was the model. In the speeches, however, which Demosthenes composed for clients in ordinary litigation, as well as in the speeches delivered against his guardians, he observes the forensic proprieties as exemplified in Antiphon and Isaeus. Outside the ranks of the professional speech-writers was a large number of men who appeared in court as litigants, prosecutors, and advocates with speeches of their own composition. Many of these no doubt reverted to type just as Cleon, who "slanged and lied, and slandered and betongued Aristophanes, roaring like Niagara."

The remains of Attic oratory are surprisingly lacking in humor. The modern reader, familiar with anthologies of court humor, is naturally disappointed with the meager amount of humor found in the speeches of the fellow-citizens of Aristophanes. But in this connection it should be remembered that there are marked differences between Athenian and modern procedure. The main sources of wit and humor in a modern court are the retorts of recalcitrant witnesses in the course of cross-examination and the *obiter dicta* of the judges, both of which were unknown in an Athenian court. In the fifth century witnesses were questioned but not cross-examined; in the fourth century all testimonial evidence was presented in the form of affidavits. The nearest approach to cross-examination was the interrogation of litigants by each other in open court, a proceeding which may well have afforded a quick-witted man plenty of opportunity for repartee and retort; but such examinations as are recorded are wholly devoid of humor. The bulk of the extant speeches were not composed by the men

who delivered them but by experts whose professional success depended in some measure upon their ability to adapt their compositions to the characters of their clients. A speech-writer who lacked a sense of humor could not compose a witty speech, and a client who lacked it should not deliver one, for humor is spontaneous. There is more humor in the professional speeches of Lysias than in those of the other orators just because he above all others sought to portray the character of his clients. If a client displayed a sense of humor it was the merit of Lysias that he tried to reflect it in his speech. Occasionally a whole speech might be permeated with humor, but, as a rule, sarcasm and pleasantries are sporadic. This is natural. It is more than probable that Lysias picked up a number of humorous expressions used by his clients in discussing their cases and cleverly incorporated them in his speech. Indeed, it is not at all unlikely that the majority of the pleasantries that appear in Lysias' orations originated with his clients. He displays his own sense of humor in seizing upon and employing them skilfully.

A survey of the remains of Attic forensic oratory and other appropriate sources yields so little in the way of stories, jests, and humor that the material is easily assembled. On one occasion when Demosthenes was defending a prisoner on a capital charge he observed that the dicasts were listless and inattentive. Thereupon he said:

> Gentlemen, I have an amusing tale to tell you. A man hired an ass to take him from Athens to Megara. The sun became so hot at noon that he dismounted and sat in the shade of the ass. The

driver objected. "Why, man," cried the traveler, "did I not hire the ass for the day?" "Yes, indeed," replied the driver, "to carry you but not to shelter you." Each party insisted on his view and neither would yield. Finally they went to law.

The orator ceased, but the jurymen clamored to know the outcome of the case. "What," said Demosthenes, "are you so interested in a dispute about a donkey's shadow, and yet in a matter of life and death you will not even take the trouble to listen?" Demosthenes is also credited with a bit of effective repartee. A thief nicknamed Brass once reproached Demosthenes for keeping late hours and writing speeches by candlelight. "I know very well," replied Demosthenes, "that you would rather have all lights out: and do not wonder, Gentlemen, that many robberies are committed, since we have thieves of brass and walls of clay." One might suppose that the great duel between Aeschines and Demosthenes would yield some characteristic bits of Attic humor. But disappointment awaits him. I note one example. It was good form in Athens for a speaker to keep his right hand within the folds of his robe. Demosthenes alludes to this custom when, accusing Aeschines of accepting bribes from Philip of Macedon, he says: "You ought to keep your hand under your robe not when you are on the platform but when you are on an embassy." Scurrilous abuse and vulgar personalities are plentiful, but humor is rare. The struggle was too bitter and the passions aroused too violent. In the *Oration on the Crown,* Demosthenes ends a lengthy tirade with a famous series of antitheses. "You taught reading, I went to school; you performed initiations, I received them; you

danced in the chorus, I paid for it; you were an assembly clerk, I was a speaker in the assembly; you acted third-rate rôles, I was in the audience; you broke down, I hissed." This comes as a welcome relief to the detailed personalities that precede. An angry man cannot be humorous.

That a personal attack can be humorous appears in a passage in Lysias. The defendant was Aeschines, a former pupil of Socrates. The speaker had lent him a sum of money to embark in business as a distiller of perfumes, "reflecting that he was a disciple of Socrates and was in the habit of discoursing impressively concerning virtue and justice." Many others also were deceived by his fine professions. The speaker continues:

> I am not the only one whom he has treated in this fashion. Have not the grocers in his neighborhood shut up shop and sued him? His neighbors have been so annoyed by him that even those who own houses have moved into rented quarters elsewhere. His creditors swarm to his house in such numbers from early morning demanding their money that passers-by think a funeral is in progress. The merchants in the Piraeus regard a business transaction with him as more dangerous than a voyage to the Adriatic. For he thinks what he has borrowed is more his own than what he inherited from his father.

His propensity for borrowing is well attested by the story that Socrates advised him to borrow from himself by cutting down his rations. The attack ends with a scandalous story about Aeschines. The woman in the case is said to be so old that "her teeth are more easily counted than her fingers."

A few scattered witticisms occur. Demosthenes had a series of quarrels with Meidias, and finally prosecuted

him for aggravated assault and battery because he slapped his face in the theater during a celebration of the Dionysia. On a number of occasions Demosthenes made capital out of this assault. Finally, Aeschines was inspired to remark, "It is an investment not a head that the fellow has," or as Dobson renders it, "His face is his fortune." A client of Demosthenes, defendant in a drainage suit, asks plaintively: "What am I to do with the surplus water on my land if I can drain it neither on to the road nor on to my neighbors' land? Will the plaintiff insist that I drink it?" A client of Lysias on trial for killing his wife's paramour, as the law permitted him to do, remarks with grim humor that if he is convicted of murder an unfortunate precedent will be established and in future housebreakers caught in the act will escape violence by claiming that they are adulterers.

Occasionally an entire passage is permeated with humor. In one of Isaeus' speeches, said to have been delivered by Isaeus himself in the interest of a friend, occurs an amusing description of the claimants to the estate of one Nicostratus who died abroad. I quote a few sentences only as the passage is long.

> Who did not have his hair cropped in mourning when those two talents came from Ake? Who did not put on black in the hope of inheriting the money by his display of grief? What a crowd of relatives, and sons by testamentary adoption appeared as claimants of the estate of Nicostratus! . . . . Ameiniades appeared before the archon with a son of the deceased under three years of age though Nicostratus had not been in Athens for eleven years.

The speech of Lysias in behalf of a cripple who was in receipt of state aid is unique in that it is pervaded by a "broad humor just stopping short of burlesque." The list of state dependents was revised periodically, and any citizen might on these occasions present reasons to the senate why a particular individual should not continue to receive the gratuity. The cripple in the case was an old man who kept a small shop where he plied a trade. According to the accuser, his place was a favorite resort for a group of undesirable citizens. Evidently the cripple was a more or less privileged character with a sharp tongue. Lysias, seeing the humor of the situation, hit it off in a most amusing speech which must have gratified the court habitués and confounded the unlucky accuser. It is a mixture of serious pleading, ironical pathos and witty retort. Among the possible motives for the attack on his pittance of an *obol* (three cents) a day he suggests blackmail. "If I were selected to furnish a chorus for a drama—a ridiculous supposition—my opponent would perform the liturgy ten times rather than exchange property once." "Why does he not claim that I am a vigorous person because I handle two canes while others use only one?" The accuser had charged him with being a violent, overbearing, and insolent person, referring no doubt to his impudent manners and ready tongue. But the cripple chose to understand him to mean that he bullied people, a manifest absurdity. In answer to the charge that his shop was frequented by disreputable citizens he replies that they are neither better nor worse than the jurors, each of whom has his favorite lounging place among the bar-

bers and bakers and candlestick-makers, a rare piece of impudence. Occasional bits of homely philosophy appear. Old men must be careful. Young men are pardoned for their youthful errors but elderly wrongdoers are condemned alike by old and young. "This trial," he concludes, "is a two-penny half-penny [*obol*] affair. If I get justice I'll be grateful to you and my accuser will learn in future not to attack weaklings but his equals."

Perhaps the best example of sarcasm in the orators is the following fragment of Hyperides:

> The reasons which Demades has introduced are not the true justification for Euthycrates' appointment, but if he must be your *proxenus* I propose the following decree which I have drafted, setting forth the true reasons why he should be so appointed:—WHEREAS, Euthycrates acts and speaks in the interest of Philip; WHEREAS when he was commander of horse he betrayed the Olynthian cavalry [allies of Athens] to Philip; WHEREAS by this act of treachery he was responsible for the destruction of the Chalcidians; WHEREAS after the capture of Olynthus he served as valuator of the prisoners; WHEREAS in regard to the temple of Delphi he opposed the interests of Athens; WHEREAS when Athens was defeated at Chaeronea he neither helped to bury the dead nor to ransom the prisoners, *therefore be it resolved* that Euthycrates be appointed *proxenus*.

This is the story of Attic forensic humor so far as the extant speeches are concerned. But there are indications that court proceedings were not so dull as this showing might lead one to suppose. Philocleon, in the *Wasps* of Aristophanes, meets his son's attempts to turn him from "his up-early-false-informing-troublesome-litigious life" to a "life of ease and splendor" with an

enthusiastic description of the joys of the dicasts which might be entitled "This is the life." Of the litigants he says: "Some tell us tales of other times and quote old Aesop's wit, and crack their jokes to make us smile." Now jokes and stories, as we have seen, are remarkably scarce in Attic forensic oratory, and one would be inclined to dismiss these statements as gross exaggerations were it not for the serious protest of Demosthenes against the prevailing practice of distracting attention from serious offenses by a display of wit in the courtroom. "You, O Athenians, acquit men who are plainly proved guilty of the gravest offenses if they merely say one or two witty things, and some fellow-tribesmen, chosen to be their advocates, plead for them. If you do convict anyone you fix the penalty at twenty-five drachmas." Demosthenes is evidently referring to comparatively trifling cases, as the size of the fine would seem to indicate. His description of them as "the gravest offenses" is largely rhetorical exaggeration. This was just the type of case that a man would be most likely to handle himself without incurring the expense of hiring a lawyer. And it is from men who had the assurance to handle their own cases that repartee, jokes, and witticisms are to be expected. Moreover, these are the only litigants who could safely venture to "drag up and cross-examine their opponents, setting little legal traps," as Aristophanes puts it.

In this connection it must not be forgotten that a published speech was not a record of all that was said and done in court. Plato represents Socrates as addressing the jury informally for a few minutes after the con-

clusion of the trial. Others may have done likewise. Philocleon, in the *Wasps,* says:

> If ever Oeagrus [a famous actor] gets into a suit be sure that he'll never get out again until he gives us a speech from his Niobe part, selecting the best and the liveliest one. And if a piper gain his cause he pays us our price for the kindness done by piping a tune with his mouth band on, quick march as out of the court we go.

Such informalities as these may easily have afforded opportunities for jests and stories. How far a published speech differed from the one actually delivered it is impossible to say. At any rate, one may doubt that Demosthenes would have included the story of the ass's shadow in a published version of his speech. It would seem, then, that the professional speech-writers made little effort to introduce jests and pleasantries into their compositions. Consequently, the jokes and stories that delighted Philocleon and scandalized Demosthenes must have appeared in the interrogatories and speeches composed by the litigants themselves and in the informal exchanges and proceedings permitted in an Athenian court.

CHAPTER XI

NOTABLE ATHENIAN TRIALS

With a view to illustrating legal procedure and some of the more characteristic vicissitudes and tactics in litigation described in the preceding pages I have given summaries of four trials which involve such distinguished Athenians as Antiphon, Socrates, and Demosthenes. At the same time they are typical Athenian cases—two kinds of impeachment, a criminal trial and a civil suit.

TRIAL OF ANTIPHON

On the overthrow of the oligarchy of the Four Hundred in 411 B.C. Antiphon and Archeptolemus were charged with treasonable dealings with the enemy because they had been members of an embassy sent to Sparta to conclude peace on terms favorable to the oligarchs. The impeachment was instituted in the senate by the ten generals presumably because the embassy was prejudicial to the interests of the army. There is some doubt whether the senate took the initiative or was empowered by the assembly to take action. There is no indication that the accused were present at the session of the senate. A prima facie case was established, and the generals were instructed by resolution to take the accused into custody and to produce them when required, for a trial before a court presided over by the Thesmothetae. The generals, assisted by ten ad-

vocates selected from among the senators, and any volunteers who wished to participate, were to conduct the prosecution. Of Antiphon's defense Thucydides says: "He made the ablest plea for his life of all men up to my time." And when the poet Agathon congratulated him after his conviction on the brilliancy of his defense he replied like an aristocrat and a scholar that he preferred the approval of a man of taste to that of any number of the common herd. The discovery of some papyrus fragments in 1907 has restored to the world a page of this famous speech.

The verdict was as follows:

Found guilty of treason—Archeptolemus son of Hippodamus, of Agryle, being present: Antiphon son of Sophilus, of Rhamnus, being present. The award on these two men was that they be delivered to the Eleven: that their property be confiscated and the goddess have the tithe: that their houses be razed and boundary stones be put on the sites with the inscriptions, "the houses of Archeptolemus and Antiphon traitors": that the two demarchs [of Agryle and Rhamnus] shall point out their houses. That it shall be unlawful to bury them at Athens or in any land over which the Athenians rule. That Archeptolemus and Antiphon and their descendants, legitimate and illegitimate, shall be infamous: and if a man adopt any one of the race of Archeptolemus or Antiphon let the adopter be infamous.[1]

TRIAL OF THE GENERALS

Five years after the overthrow of the Four Hundred and the death of Antiphon there occurred a trial which though somewhat irregular is an instructive example of an impeachment tried not by a court but by

[1] Pseudo-Plutarch, *Lives of the Ten Attic Orators* (trans. by Jebb).

the assembly itself.[2] In 406 the Athenian naval forces won an important victory off the islands of Arginusae with the loss of twenty-five ships disabled. Immediately after the battle Erasinades, one of the generals in command, proposed to go at once to the relief of a squadron blockaded in the harbor of Mytilene before picking up the casualties. His proposal was rejected in favor of the suggestion of Diomedon to effect both objects by detaching some ships to visit the wrecks while the main force proceeded to Mytilene. The rescue work was assigned to two trierarchs: Theramenes, who had been a member of the moderate section of the Four Hundred; and Thrasybulus, who was afterward distinguished as leader of the counter revolution against the Thirty Tyrants. Whether the generals were slow in reaching a decision regarding the measures to be taken for rescuing the men on the disabled ships or the captains were remiss in carrying out the orders is uncertain. At any rate, when the squadron was assembled such a violent storm had arisen that it was no longer possible to visit the wrecks. In their report of the battle sent to the senate the generals after some discussion decided to explain their failure to pick up the casualties as due to the storm without mentioning the delegation of the task to others. Though delighted with the victory the Athenians in their grief over the loss of the men deposed the generals with the exception of Conon, who had been in command of the blockaded squadron, and ordered them to report. Only six obeyed the

[2] Cf. Underhill, "The Trial of the Generals after Arginusae," *Commentary on the Hellenica of Xenophon,* p. 325.

summons. One of them was Pericles, son of the great statesman and Aspasia.

The senate took action and on motion of Timocrates decided to arrest the generals and turn them over to the assembly rather than a court as was done in the case of Antiphon. The offense was betrayal of naval forces of the city. The first hearing before the assembly was in the nature of a preliminary hearing such as magistrates conducted before the regular trial to establish prima facie cases. Theramenes was the chief accuser. It would seem that the adequacy of their explanation that the storm rendered the work of rescue impossible was called in question. Had the work been undertaken immediately it could easily have been accomplished before the storm arose. Somebody was remiss. This situation had forced Theramenes in self-defense to accuse the generals who spoke briefly in their own defense. At this stage in the proceedings no fixed time for speaking was allowed defendants. The impression produced on the assembly was distinctly favorable as was shown by the readiness of members to offer bail for the appearance of the generals at the next hearing if it was decided to go on with the prosecution. It would seem that they had been kept in prison by reason of their inability to find any one to furnish bail. The opponents of the generals sensing the favorable attitude of the assembly put through a motion for adjournment on the plea that it would be too dark to take a vote by show of hands. At the same time a motion was passed instructing the senate to bring in a resolution providing for the trial. The unfairness of these tactics is obvious. Before the

senate acted on this motion the Apaturia was celebrated. Like our Christmas it was the occasion of family reunions which emphasized the grief of bereaved relatives. Taking advantage of this situation, Theramenes and his friends are said to have made every effort to exasperate the populace against the generals. And the senate's resolution reflected very strongly the altered state of public opinion.

> Resolved that since the Athenians have heard in the previous meeting of the assembly both the accusers who brought charges against the generals and the generals speaking in their own defence, they do now one and all cast their votes by tribes; and that two urns be set at the voting place of each tribe; and that in each tribe a herald proclaim that whoever adjudges the generals guilty, for not picking up the men who won the victory in the naval battle, shall cast his vote in the first urn, and whoever adjudges them not guilty, shall cast his vote in the second; and if they be adjudged guilty, that they be handed over to the Eleven and be punished with death, and that their property be confiscated and the tenth thereof belong to the goddess.

This resolution was challenged, and it was proposed to indict the mover for unconstitutional legislation. There is no indication of the grounds for the indictment. The immediate effect of the indictment would have been a suspension of the resolution and consequent delay in the trial. The mob protested. Lysicles made a motion that those responsible for the proposed indictment be included with the generals in the senate resolution. This could scarcely be a serious proposal, but it had the effect of intimidating the prosecutors, and forcing the withdrawal of the indictment. But some of the Prytaneis, presidents of the assembly, refused to put the

motion on the ground that it was illegal. Again the mob protested, and all but Socrates yielded. The opposition of Socrates was of no avail; he was overruled by the others. Before the motion was put Euryptolemus, cousin of Pericles, proposed an amendment providing either for a separate trial for each man in the assembly or a reference to a regular court with the severest kind of punishment in case of conviction, viz., death, confiscation of property, and burial beyond the borders. At first the amendment carried, but the vote was at once challenged. The objection, whatever it was, apparently was answered by putting the amendment again in proper form. This time it was lost and the original motion prevailed. The generals were condemned without further opportunity for defense. Euryptolemus, their advocate, in supporting his motion for a trial by the assembly characterized the procedure recommended in the resolution of the senate as contrary to law. The illegality, it would seem, consisted in denying them separate trials and adequate time for defense. It was no doubt on these grounds that it was challenged in the assembly as unconstitutional. Euryptolemus warned the people that if they persisted in their illegal course they would surely regret it. And they did. Athenian law provided that those who deceived the people should be impeached. It was voted that Callixenus, the mover of the senate resolution, and some others should be tried under this law. They were arrested, but contrived to escape from prison. After the overthrow of the Thirty Tyrants, Callixenus returned under the general amnesty. But he was so hated that he was permitted to

die of starvation. This belated action was of no benefit to the victims of injustice, but it served as a salutary warning for the future.

Miscarriages of justice occur under all systems, but the injustice of this trial is so glaring and so deliberate that modern readers are apt to conclude that the Athenians in assembly were a headstrong, unreflecting mob that defied all restraints imposed by law when the mob spirit was aroused. The trouble lay rather in using a political body as a tribunal. It was not sufficient to provide constitutional safeguards. The people were not in the right frame of mind to turn from a question of policy to a legal trial. It was inevitable that they should tend to carry over into their judicial proceedings the same passions and animosities that characterized their political controversies. It was different when even a large panel was assembled as a tribunal. They were under oath, and the defendants had a fixed time for their defense. The atmosphere was quite different from that of the Pnyx. The law holding speakers responsible for deceiving the people in senate, assembly, or dicastery was a laudable attempt to minimize some of the evils of a system that put into the hands of the sovereign people the administration of justice on occasion. The notoriety of this trial shows that such patent miscarriages of justice were the exception and not the rule.

TRIAL OF SOCRATES

The trial of Socrates for impiety occurred in 399 B.C. Diogenes Laertius has given the indictment in his life of Socrates.

This indictment Meletus, son of Meletus, of Pitthis brought against Socrates, son of Sophroniscus, of Alopece. Socrates is a wrongdoer because he does not believe in the gods in which the city believes but introduces other new divinities. And furthermore he is a wrongdoer because he corrupts the young men. Penalty, death.

As the charge was impiety the case came within the jurisdiction of the King Archon who dealt with all religious offenses. The scene of Plato's dialogue entitled *Euthyphro* is the porch of the King Archon where Socrates has just filed his answer to the indictment.

EUTHYPHRO: Why have you left the Lyceum, Socrates? And what are you doing in the Porch of the king archon? Surely you cannot be concerned in a suit before the king like myself?

SOCRATES: Not a suit, Euthyphro. Indictment is the word which the Athenians use.

EUTH.: What! I suppose that someone has been prosecuting you, for I cannot believe that you are the prosecutor of another.

SOC.: Certainly not.

EUTH.: Then some one else has been prosecuting you?

SOC.: Yes.

EUTH.: And who is he?

SOC.: A young man who is little known. His name is Meletus.

EUTH.: What is the charge he brings against you?

SOC.: A very serious charge. . . . . He says he knows how the youths are corrupted and who are their corruptors. I fancy he must be a wise man and seeing I am the reverse of a wise man, he has found me out and is going to accuse me of corrupting his young friends. . . . . He brings a strange accusation against me which at first hearing excites surprise: he says I am a maker of gods, and that I invent new gods and deny the existence of old ones; this is the ground of his indictment.

EUTH.: I understand, Socrates; he means to attack you about the familiar sign which, occasionally, as you say, comes to you.

Euthyphro is right. The charge of impiety was based upon the claim of Socrates that whenever he was about to do something that was not right he was always dissuaded by an inner voice which he called *daemonion*.

Lysias, who was just coming into prominence as a lawyer at the time, composed a speech and gave it to Socrates with whom he was on quite friendly terms. On reading it Socrates said, "It is a fine speech, my dear Lysias, but it is not suitable for me." And it was, to be sure, more rhetorical and forensic than philosophical in form and character. When Lysias inquired why if it was a good speech it was not suitable, Socrates replied, "Is it not possible that there are fine shoes and clothes which are not suitable for me?" Lysias was not the only friend of Socrates who was concerned about his defense. Just before the case came to trial Hermogenes, an intimate friend, remonstrated with him for discussing anything and everything rather than the trial and inquired, "Ought you not to be considering what you are going to say in your defense?" "Don't you think," replied Socrates, "that I have been preparing for my defense all my life by doing nothing wrong?" Hermogenes is far from being satisfied with this answer and points out that innocent men are often convicted and wrongdoers acquitted by dicasts influenced by eloquence or yielding to pity.

In the interval before the trial with its preliminary hearings Socrates was at liberty. He might even have avoided trial altogether by going into voluntary exile, according to Athenian law; but once he elected to stand trial he had to abide by the consequences.

There were several contemporary accounts of the progress of the trial. Of the two that are extant the most circumstantial is Xenophon's *Apology of Socrates*. One day Socrates met in a narrow lane an extraordinarily handsome and modest youth whom he stopped by putting his staff across the path and questioned in accordance with his usual custom. Finding the young man unable to tell him where men became "fine and good," he said, "'Follow me and learn." Thus Xenophon became a pupil of Socrates. In 401 he joined the famous Ten Thousand Greek mercenaries of Cyrus and so was absent from Athens when Socrates was tried. On his return he recorded the facts as he learned them from Hermogenes, one of Socrates' young friends. He offers an explanation of the "arrogancy of his address" which he says other writers had noted without explaining. Being dissuaded by the inner voice on two occasions from preparing a speech Socrates concluded that he was divinely directed to let matters take their course, reflecting that at his time of life while yet in full possession of his faculties an easy death was preferable to the approaching ills of old age. "If by proclaiming all the blessings I owe to gods and men; if by blazoning forth the opinion which I entertain with regard to myself I end by wearying the court, even so will I choose death rather than supplicate in servile fashion for leave to live a little longer merely to gain a life impoverished in place of death." The case was heard by a panel of five hundred and one. Meletus, the prosecutor, was assisted by Anytus, a well-known politician, and Lycon who is otherwise unknown.

Athenian law forbade the joining of different crimes in the same indictment, but the law was not strictly interpreted and enforced. Offenses against public morality could be combined with a charge of impiety. Aspasia was indicted for impiety and "contributing to the delinquency of young girls." This is a sufficient precedent for the form of the indictment of Socrates. Addressing himself first to the charge that he introduced new divinities he was met with protests from the judges who "murmured their dissent, some disbelieving what was said, and others out of simple envy that Socrates should actually receive more from heaven than they." His citation of the oracle of Delphi to the effect that he was the wisest man was greeted with a "fiercer murmur of dissent." At the conclusion of his speech a number of his friends including Plato advocated his cause. A verdict of guilty was rendered by a majority of sixty-one. As no specific punishment for impiety was provided by law, a second trial was held immediately before the same panel to fix the penalty. Meletus had asked for the death penalty and Socrates had the privilege of suggesting a counter penalty. This at first he refused to do on the ground that it would imply an admission of guilt. It appears from Xenophon's account that he persisted in his refusal but this is unlikely. In the end he was prevailed upon to propose a fine, though in view of the attitude of the court banishment would have been a more reasonable proposal. The proposed fine was small, either five or twenty dollars. When the judges protested volubly he, in what must have seemed a spirit of contempt, boldly proposed maintenance at the pub-

lic expense in the Prytaneum as a reward for his services to the Athenians such as other public benefactors were accustomed to receive. This attitude so exasperated the judges that the majority in favor of the death penalty was one hundred and forty-one as compared with a majority of sixty-one on the question of guilt. After the trial he calmly discussed the verdict with friends and left the court "in a manner quite in conformity with the words he had spoken—so bright an air was discernible alike in the glance of his eye, his gestures, and his step."

Plato's account of the trial is in the form of a forensic speech[3] in which he has skilfully combined the forensic and rhetorical elements that Socrates found objectionable in Lysias' speech with the philosophical qualities which it lacked. The language approximates the homely, everyday speech that Socrates employed in his daily discussions. The *Apology* of Plato consists of three distinct speeches. The first is in answer to the speeches of the prosecutors and deals with the question of guilt or innocence. The second, delivered after the verdict of "guilty" had been rendered, is devoted to the presentation of the alternative penalties proposed by Socrates. The third is an informal address to the judges after the conclusion of the trial. Socrates had been left in the courtroom for a brief period while the officials were making preparations to convey him to prison, and he employed the interval in addressing first those who had voted for conviction and then those who had voted

[3] Bonner, "The Legal Setting of Plato's *Apology*," *Classical Philology*, III, 169 ff.

for acquittal. There is no parallel to this proceeding in Athenian practice. Plato has merely chosen to throw into the form of a speech the informal remarks which Socrates, according to Xenophon, made at some length to his friends. His words may very well have been heard by any of the judges who cared to listen. Plato reverses the order of the penalties proposed by the Xenophontic Socrates. He puts maintenance in the Prytaneum first and then a fine of a mina, afterward increased by his friends, including Plato, to thirty minas ($540). This would be natural for a man to do who claimed that he was not a public offender but a public benefactor. But the reverse order—fine, reward—is more in keeping with the "arrogancy of speech" discussed by Xenophon. Socrates marked his contempt for the protests of the judges when he proposed a fine by substituting a reward for the fine.

In spite of the alleged extemporary character of the main speech as given by Plato, commonplaces, stereotyped topics, and appeals are not altogether lacking though they are introduced in such fashion as to convey the impression of naturalness, for example, the statement that this is his first appearance in court, the promise to "tell the whole truth and nothing but the truth," the appeal to the Heliastic oath, and the repeated requests for a quiet hearing. Similarly, the skilful way in which he seeks to establish the credibility of Chaerephon, the recipient of the oracle naming Socrates as the wisest man, by dilating upon his democratic loyalty and his banishment under the Thirty Tyrants, is in line with the common practice of the speech-writers in seek-

ing to gain sympathy for a client or confidence in a witness by drawing attention to his unswerving support of democratic institutions. The customary references to services rendered to the state seem at first sight to be lacking, but this is simply another instance of abandoning the form and retaining the substance. For nothing in the way of appeal could be more effective than the seemingly casual but really subtle references to his military services at the siege of Potidaea and the battle of Delium.

The casual questions which are known from the Xenophontic *Apology* to have been addressed to Meletus are elaborated by Plato into a striking illustration of the extraordinary effectiveness of interrogations of litigants in open court conducted by such a master of cross-examination as Socrates was. For confirmation of some of his statements the Platonic Socrates appeals to the knowledge of the judges. This means of corroboration was regularly employed in the Athenian courts. He also uses a challenge very effectively. In answer to the accusation that he had corrupted the youth he inquires why neither they nor their relatives have been put in the witness box. If this is an oversight on the part of the prosecutor, Socrates offers him a portion of his own time in which to rectify the mistake. In dramatic fashion he points out a number of his young companions and their relatives in court and challenges Meletus to call them up as witnesses against him. On two occasions testimonial evidence is promised, but there is no indication that it was produced.

As a rule there was little delay in executing the sen-

tence in capital cases, but owing to a fortunate circumstance the sentence in this case was not executed immediately. On the day before the trial a sacred embassy had set out for Delos. Until its return executions were not permitted as the city must be kept unpolluted. On this occasion adverse winds delayed the return of the mission for many days. In the interval Socrates had ample opportunity for communion with his friends. Plato's dialogues, *Crito* and *Phaedo,* belong to this period. The former recounts Crito's unsuccessful attempt to persuade Socrates to make his escape from prison. The *Phaedo* is devoted to a discussion of the immortality of the soul and a description of the last hours of Socrates. "And this," says Plato, "was the end of our friend, the best, the wisest, the most just man of his time." No less effective is Xenophon's simple eulogy. "If any one of those who make virtue their pursuit has ever met a more helpful friend than Socrates, I tender such an one my congratulations as a most enviable man."

As in the case of the generals so in the case of Socrates there was a popular reaction against the verdict though the proceedings were entirely regular. A bronze statue by the great sculptor Lysippus was erected in his honor. If there is any truth in the statement of Diogenes Laertius, to the effect that Meletus was condemned to death and the others sent into exile, the only accusation that could have been used was that they had deceived the people. There is no mention of such a trial in contemporary accounts.

Demosthenes v. *Aphobus, et al.*

The will of Demosthenes the elder provided that his widow should marry Aphobus, one of his nephews, with a dowry of eighty minas; that his daughter, upon reaching a marriageable age, should marry Demophon, another of his nephews, with a dowry of two talents; that these two and an old friend Therippides should be executors of the estate and guardians of his infant children, a girl of five years, and Demosthenes, the future orator, two years older. Therippides was to receive the interest on seventy minas during the minority of Demosthenes. The residue of the estate was to be invested and the surplus income beyond what was required for the maintenance of the children allowed to accumulate for Demosthenes.

The practice of betrothing a widow to the executor of an estate and guardian of the children was not uncommon in Greece. It was thought that the relationship thus established insured greater interest on the part of the guardian. Demosthenes in a speech composed for his client, Phormio the banker, who had married the widow of the famous banker Pasion according to a will cites other examples of the practice both in Athens and Aegina.

The value of the estate according to Demosthenes was thirteen talents and forty-six minas. He contended that under proper management the value of the estate should have doubled or trebled. But instead of leasing the shield manufactory and investing the money on hand they mismanaged, squandered and appropriated

the property in such fashion that when Demosthenes reached his majority he received only a tenth of what was due him. Among other wrongs committed by Aphobus and Demophon was their taking the dowries without marrying the women for whom Demosthenes now had to provide if he failed to recover the dowries. Being unable to obtain any satisfaction from them, Demosthenes first proposed to refer the dispute to the arbitration of friends of both parties. This proposal they refused to accept, and Demosthenes was forced to resort to the courts.

It was no light undertaking to attack three men of means whose resources were augmented from the plundered estate. Fortunately, his education had not been neglected though his teachers had been defrauded of their fees by his guardians. He might very well have procured suitable speeches from a professional writer and gained the support of capable advocates, but he preferred to compose his own speeches. It seems that about this time he heard Callistratus, the ablest orator and statesman of his day, make his famous defense against the charge of treason in connection with the loss of Oropus on the northern frontier of Attica. The eloquent plea of the great statesman had fired the ambition of the youth to become a speaker capable of serving his country. Accordingly, he applied to Isaeus for advice and instruction. At the end of two years he deemed himself adequately prepared for the contest and issued a writ against Aphobus for ten talents in 364 B.C. The case was first turned over to a public arbitrator who gave a verdict in favor of Demosthenes.

Aphobus refused to accept the award and appealed to a heliastic court. A few days before the hearing Aphobus induced one Thrasylochus, brother of Meidias, who afterward became one of Demosthenes' bitterest enemies, to challenge him to undertake a trierarchy or to exchange property for the purpose of performing the service. Athenian law provided a means of settling such a dispute, but Demosthenes could not wait for the slow processes of the law. The purpose of this maneuver on the part of Aphobus was to embarrass Demosthenes financially if he performed the expensive service with his already slender means or in case he accepted the exchange of property to secure a release from the new owner of Demosthenes' estate, for *choses* in action were included in the exchange. At first Demosthenes provisionally agreed to accept the exchange. Thrasylochus at once took steps to release the guardians of all claims. But Demosthenes, realizing in time the predicament he was in, withdrew his consent and undertook the trierarchy.

The case came to trial, and a verdict for ten talents was returned in favor of Demosthenes. Aphobus tried to reopen the case by prosecuting a witness for perjury and securing a new trial. Previous to the trial Aphobus had challenged Demosthenes to give up for examination under torture Milyas, foreman of the sword manufactory which belonged to the estate. Demosthenes refused to accept the challenge on the ground that the man was a freedman, having been emancipated by his father shortly before his death. To substantiate this claim he put in testimony by three witnesses that Apho-

bus had admitted at the arbitration that the man was not a slave. Aphobus now began proceedings against two of these witnesses. Demosthenes defended Phanus, the first to be tried, in a speech which is extant, *Against Aphobus*. He argued that even if the testimony attacked was false it was not material, and took occasion to review some of the strong points of the main suit in accordance with Athenian practice. Phanus was acquitted and Demosthenes proceeded to try to collect the ten talents awarded him. Aphobus put every possible obstacle in his way so as to prevent execution of the judgment. Accordingly, when Demosthenes tried to take possession of a house and lot belonging to Aphobus, his brother-in-law Onetor came forward with a claim that the property had been mortgaged to him to secure the repayment of the dower of his sister whom Aphobus had divorced. The proper procedure was an action of ejectment against Onetor. Demosthenes' speeches in this action are extant. He argued that the woman had never actually been divorced and that the mortgage was fraudulent, and intended to defeat his efforts to realize on the judgment. The outcome of the case is unknown.

The claims against the other guardians never came to trial. In face of the very substantial verdict against Aphobus it is probable that they made a compromise. At any rate, Demosthenes was afterward quite friendly with Demon, the father of his guardian Demophon, and wrote a speech for him in his suit against Zenothemis which is extant. According to Plutarch, Demosthenes recovered only a small portion of his estate. This statement is confirmed by remarks that Demosthenes makes

in his speech against Meidias in his suit for aggravated assault.

TRIAL OF THE DOG

No collection of notable Athenian trials would be complete without Aristophanes' clever burlesque of an Athenian trial in the *Wasps*. In the comedy Philocleon, an old confirmed dicast, is finally persuaded by his son Anticleon to renounce jury service and administer justice at home among the members of his household. The son fits up a domestic court and conducts proceedings like a regular magistrate. The father hears the cases. The prosecuting dog—an actor with a canine makeup—answers his name with a bark. The prosecution is conducted by Sosias, a slave acting as an advocate. The defendant dog through fear is unable even to bark, and Anticleon acts as his advocate.

The official railing to separate the court from the general public, the voting urns, and the water clock are all there. The court is opened with an invocation to Apollo. Then follow indictment, speeches, examination of witnesses, and the whining of the pups of the defendant. The proceedings are constantly interrupted and enlivened in true Attic fashion by the comments of the old dicast.

For the audience much of the humor of the proceedings was due to the fact that the dog accused of stealing Sicilian cheese really represented Laches, a prominent general who while in command of an expedition to Sicily a few years before was suspected of peculation in collusion with the paymaster—the cheese-grater of the

comedy. It seems likely that he was actually prosecuted by the demagogue Cleon.[4] The name of the dog, Labes, thinly veils the general's name. But the name also involves in true Aristophanic fashion a pun on the word λαμβάνω (root λαβ-) meaning "to take" or "to seize." Aristophanes' puns, of which there are several in this scene, are not easy to reproduce. But the efforts of translators are often amusing even where they are far from being successful. Caesar, a common name for a dog, may serve to render the Greek *Labes,* the "seizer."[5] Similarly, the unnamed dog who prosecuted is really Cleon (Kleon), whose name is at once suggested by *Kuon,* the word for "dog."

But there is no need for further concern with this aspect of the case. As a takeoff on an Athenian trial by a great comedian, the scene amply justifies itself.

SON: Come, father, in heaven's name be guided by me.

FATHER: In what am I to be guided by you? Mention anything you please with one exception.

SON: What's that? Let me hear it.

FATHER: My retiring from the bench. Death shall decide the issue ere I agree to that.

SON: Well, if you can't be happy off the bench resign your city judgeship, stay at home and mete out justice to your own household.

FATHER. About what? You're talking nonsense.

SON: The same things that are handled in the regular courts. If a housemaid opens the front door on the sly fine her two bits.

[4] Bury, *op. cit.,* p. 465.

[5] I am much indebted to Rogers' version from which I have borrowed freely. The distribution of parts which is at times uncertain is that of the Oxford edition. I have omitted a few passages which could not be readily understood without a tedious commentary.

At any rate that's what you did in court on such occasions. Moreover you'll fix things up to suit yourself. If at dawn the day promises to be warm sit in the sun*light* and *light* on the culprits. And if it snows or rains *enter* the house and *enter up* your judgments by the fire. And if you sleep till noon no magistrate shall exclude you from the court.

FATHER: That suits me.

SON: Besides if a litigant is longwinded you will not go hungry, worrying yourself and the defendant too.

FATHER: How shall I judge as well as formerly while *ruminating?*[6]

SON: Indeed much better. For it is a common saying that when witnesses don't tell the truth the jury *ruminates* and has difficulty in reaching a decision.

FATHER: I'm giving in to you. But one thing you don't mention. Where am I to get my pay?

SON: From me.

FATHER: Fine. I'll get my pay alone and not along with another. That practical joker Lysistratus once played me a dirty trick. Receiving two bits as pay[7] to share with me he went to the fish market for change and handed me some mullet scales as my share and I, thinking they were coins, bit and in disgust with the taste spat them out. Then I had him pulled.

SON: And what did he say to that?

FATHER: He said that I had the gizzard of a rooster and would digest them without any trouble.

SON: You see then how great an advantage you will have here.

FATHER: No small one. Carry out your scheme.

SON: Wait here. I'll go and get the equipment. [Exit.]

FATHER: Just consider how the oracles are being fulfilled.

[6] Literally, "eating."

[7] The pay of the dicast was three obols. It was often convenient for the paymaster, when change was scarce, to give a drachma (six obols) to one dicast to get change and pay another. Athenians carried small change in their mouths.

For I have heard that some day the Athenians will hold assizes in their own homes and each man will fix up a little court in his front yard like a shrine of Hecate.

SON [*returning with court properties*]: Look here. What say you now? I have brought all I promised and a lot besides. Here's this chamber pot. In case of need it will be hanging on a peg near by.

FATHER: A thoughtful and handy provision for an old man.

SON: And here is a fire with gruel beside it for you to drink when you want it.

FATHER: That's fine. If I'm feverish I'll still get my pay. For I'll stay right here and sup my gruel. But why have you brought me the rooster?

SON: That he may wake you, crowing above your head if you fall asleep when the defendant is speaking. The sooner you take your seat the sooner I'll call a case.

FATHER: Go ahead. I've long been seated.

SON: Let me see. What case can I introduce first? What misdemeanor's been committed in the house? Just now the cook burned a pot.

FATHER: Stop. You've well nigh ruined me. Are you going to call a case without a railing which was the first of the consecrated equipment of a court?

SON: By Jove, it isn't here! But I'll run in and grab whatever comes to hand.

SOSIAS [*a slave inside*]: Curses. The idea of keeping a dog like that.

FATHER: What's up now?

SOSIAS [*coming out*]: Why, hasn't that dog Caesar just now slipped into the pantry and snapped up the Sicilian cheese and bolted it?

SON: Ah, that's the first crime for me to bring before my father. [*To Sosias:*] You appear as prosecutor.

SOSIAS: Not I, by Jove! The other dog says he will prosecute if anyone will lay the information.

SON: Go bring in both of them.

SOSIAS: That's the thing to do.

FATHER: Hurry up with your case. I've got a *fine*[8] expression.

SON: All right, let me get the docket and the pleadings.

FATHER: Goodness, how slow you are. You'll weary me to death with your delays. I've been waiting to start the furrows on my lot.[9]

SON: We're ready.

FATHER: Call the parties.

SON: Here they are. Who is first?

FATHER [*going into the house*]: Confound it, how annoying! I forgot to bring out the voting urns.

SON: Hey you, where are you off to now?

FATHER: For the voting urns.

SON: Never mind. I've got these bowls.

FATHER: The very things. We've got everything we need except the water clock.

SON [*pointing to the chamber pot*]: But what's this? Isn't this a water clock?

FATHER: You manage the business well and in the Attic way.

SON: Let someone hurry up and bring fire and myrtle and frankincense that we may begin with prayer. Let there be reverent silence first of all. "O Lord and master, neighbor and guardian of my street door, Apollo, accept, O King, these rites which we inaugurate for my father. Change this too austere and stubborn mood of his. Mix some honey with his sour temper. May he be kindly to all and pity the accused rather than the accusers and weep when they beg for mercy. May he renounce his ill nature and pluck the nettle from his wrath!" If any heliast is at the door let him come in. When once they have begun to speak we'll admit no one.

FATHER: Who is the defendant here? How he will catch it!

[8] He looks like one about to impose a fine.

[9] When alternative penalties were proposed by the prosecution and the defense the dicast indicated his preference by drawing a long or a short line on a waxed tablet with his thumb-nail.

Son: Listen to the indictment. "A cur of Cydathon[10] accuses Caesar of Aexone[10] of wrongdoing in that he ate up the Sicilian cheese alone. Penalty, one collar of fig wood."

Father: Nay, rather a dog's death once he is convicted.

Son: And here stands the defendant Caesar.

Father: O, the rascal! What a thieving look he has. How he grins and thinks he will deceive me. Where's the cur of Cydathon?

Dog: Bow wow.

Son: Here he is.

Father: Another Caesar this.

Son: Yes, good to bark and lick the platters. Silence. Sit down. [*To Sosias who speaks for the prosecuting dog*:] And you step up and support your accusation.

Father: Meanwhile I'll pour me out some gruel to drink.

Sosias: Gentlemen of the jury, you have heard the indictment I brought against the defendant. Most scandalously has he treated me and the jack-tars. For slipping off into a corner he sicilized a lot of cheese, gorging himself in secret.

Father: No doubt of that, by Jove! Just now the scoundrel's breath smelled most villainously of cheese.

Sosias: He didn't share with me though I asked him. And yet who can do you a good turn if he does not toss something to me the dog?[11]

Father: No more did he share with me who represent the state.

Son: In heaven's name, father, don't prejudge the case until you've heard both sides.

Father. Why, sir, the case is clear; it shouts.

Sosias: Don't let him off. He's by far the most lone-eating cur of all dogs. Therefore punish him. For never could one thicket harbor two thieves. Let me not bark in vain. For if I do I'll never bark again.

[10] Attic demes or townships.

[11] Cleon, the demagogue, was fond of calling himself the "watch-dog of the state."

FATHER: Ah ha! What villanies he's charged him with. The thieving thing of a fellow. Don't you think so, too, Mr. Rooster? He nods assent, by Jove! Where is the Magistrate. Let him hand me the pot.

SON: Get it yourself. I am going to summon the witnesses. Up to the front, witnesses for Caesar. The pestle, the cheese grater, the stove and all the utensils that get begrimed. [*To his father:*] Are you still using the pot? Won't you ever sit down?

FATHER: I'll make this fellow have a hemorrhage today.

SON: Won't you quit being harsh and ill tempered, especially to the accused, and giving snap judgments? [*To the defendant:*] Get up and make your defence. Why are you silent? Speak.

FATHER: He doesn't seem to have anything to say.

SON: No. He is in the same predicament as Thucydides once was when standing trial. He suddenly was taken with lockjaw. Make way for me; I'll speak in his defence. It is a hard task to defend a dog that has been given a bad name. Yet I'll try. He is a fine dog and chases away the wolves.

FATHER: Nay rather a thief and a conspirator.

SON: By no means. He is the finest dog alive and capable of taking care of any number of sheep.

FATHER: What's the use if he bolts the cheese?

SON: Why, he fights for you and guards the door and is in every way most excellent. If he has stolen forgive him. Good sir, listen to the witnesses. [*To the witnesses:*] Cheese grater,[12] take the stand and speak out. You were in charge of the commissariat. Now answer plainly. Did you not grate what you got for the soldiers? [*Witness nods assent.*]

FATHER: I swear he's lying.

SON: O sir, have pity on the unfortunate. Caesar here gnaws bones, eats odds and ends and is always on the move. The other is a mere house dog; he stays right here and when anyone brings in anything he begs a share. And if denied he bites.

[12] The cheese-grater represents the paymaster of the expedition to Sicily.

FATHER: Confound it, what's the matter with me? I'm growing lenient. Something's wrong. I'm yielding to your plea.

SON: Pity him, father; don't ruin him. Where are the pups? Get up, you wretches, and whine and beg, beseech and weep.

FATHER: Get down, get down, get down, get down!

SON: I'll get down and yet that "get down"[13] has deceived many a one.

FATHER: Plague on it! This sipping is not a good thing. For now I've wept away my judgment for no other reason than because I'm full of gruel.

SON: Won't he be acquitted then?

FATHER: 'Tis hard to tell.

SON: Come, dear father, change your ways. Take this ballot, shut your eyes, make a dash for the farther urn and acquit him.

FATHER: Certainly not.

SON: Come let me lead you around the shortest way.

FATHER: Is this the nearer urn?

SON: It is.

FATHER: Here goes [*puts in his ballot*].

SON [*aside*]: He's fooled, and has acquitted him without knowing it. [*Aloud:*] I'll count.

FATHER: How went the struggle?

SON: The result will show. O Caesar, you're acquitted. Father, father, what's the matter? Water, where is there some water? Brace up.

FATHER: Now tell me this. Has he really been acquitted?

SON: Indeed he has.

FATHER: Then I'm done for.

SON. Don't worry. Get up.

FATHER: How can I ever forgive myself for letting off a defendant? May the gods pardon me. I did it unawares, contrary to my habit.

[13] When the dicasts were satisfied with a plea they shouted "Get down!"

APPENDIX

CHRONOLOGICAL TABLE

900–800. Age of Homer.
800–700. Rise of aristocracies.
700–(?). Hesiod.
650–600. Age of lawgivers.
621. Legislation of Draco.
594–593. Legislation of Solon.
560–510. Tyranny of the Pisistratidae.
508–507. Reforms of Cleisthenes.
490–479. Persian wars.
478. Confederacy of Delos; supremacy of Athens.
462–461. Areopagus deprived of its chief political and judicial powers by Ephialtes.
453–452. Institution of the thirty rural justices.
451–450. Further restriction of the powers of the Areopagus by Pericles.
450–(?). Pericles introduces pay for jurors.
446–445. Thirty Years' Peace.
431–404. Peloponnesian War; Sparta wrests the supremacy from Athens.
425. Pay for jurors increased by Cleon.
415. Mutilation of the Hermae and profanation of the Mysteries.
411. Revolution of the Four Hundred; trial of Antiphon.
410. Restoration of democracy.
406. Battle of Arginusae; trial of the generals.
404–403. The Thirty Tyrants; the Forty and the public arbitrators replace the thirty rural justices.
399. Trial of Socrates.
387–386. The King's Peace (Peace of Antalcidas).
378–377. Second Athenian confederacy; written evidence substituted for oral.

371. Battle of Leuctra; supremacy of Thebes.
362. Battle of Mantinea; Thebes loses the supremacy.
346. Peace of Philocrates; Philip's commanding position in Greece recognized.
338. Battle of Chaeronea; Philip master of Greece.
336. Assassination of Philip.
334. Alexander the Great makes war on Persia.
324. Harpalus, treasurer of Alexander, absconds to Athens.
323. Death of Alexander; unsuccessful Greek revolt.
322. Antipater forces a moderate oligarchic constitution on Athens; death of Demosthenes.

TABLE OF ATTIC MONEY

6 obols	1 drachma
100 drachmas	1 mina
60 minas	1 talent

Various estimates of the value of an Attic talent in modern money have been proposed. It has been put as low as $1,000 and as high as $1,200. These estimates are made on the basis of the amount of silver in Attic coins. Owing to fluctuations in the price of silver, the modern equivalents of Attic coins would naturally vary. If the talent be valued at $1,080 we get the following equivalents: obol, 3 cents; drachma, 18 cents; mina, $18. These equivalents do not represent the much higher purchasing power of silver in ancient times.

INDEX

[PRINTED IN U.S.A.]